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The *London Law Quarterly Review*, in a recent issue, raises the question as to liability for instituting bankruptcy proceedings against a person who is in fact solvent. It compares an imputation of insolvency put upon a trader with an imputation of unchastity against a woman, and points out how the statutes have changed the common-law rule by making the latter actionable without proof of special damages. The *Review* says: "Commercial credit is not so delicate a thing as female honor, but it is one highly susceptible of injury, for credit is, in these days, the very breath of a business man's life, and a person who presents a bankruptcy petition against a person deals a heavy blow at his commercial *status*. Yet, as the law stands, it is not clear that any action will lie without an averment of special damage. * * * It is rather surprising that there should be so little authority on this point, but the explanation no doubt is that creditors, for a very obvious reason, prefer to levy execution rather than take bankruptcy proceedings, unless the debtor is hopelessly insolvent."

Under the United States bankrupt act the petitioner in a proceeding against an alleged bankrupt, if he seeks to have the debtor's property taken into the custody of the court before final adjudication, must file a bond, and, if his petition is dismissed, he may be charged, not only with the costs and expenses, but with "damages occasioned" by the seizure, taking, or detention of the property. Injury to business reputation and standing might be caused by the proceedings, and, if so, they would seem to be within this provision of the act. But there does not seem to be any provision to cover the case of damages caused by an unfounded petition when the debtor's property is not seized. *Case and Comment* suggests that such a case would probably be disposed of on the general principles governing malicious prosecution.

The United States Court of Appeals, for the Arkansas Circuit, has recently had occasion to pass upon a new question, at least, for that State, viz.: whether, under the laws of Arkansas, a married woman, when suing for a personal injury there sustained, is entitled to recover, as a part of her damages, for a loss of earning capacity incident to the injury. The statutes of that State provide that she may maintain a suit in her own name for an injury to her person, character or property. They further provide in substance that both the real and personal property of the wife, acquired either before or after her marriage, shall be and remain her separate estate and property, and may be disposed of as if she were a *feme sole*. They also declare that property of all kinds which comes to a married woman by gift, bequest, or descent, and that which she acquires by her trade, business, labor, or services carried on or performed on her sole or separate account, and the rents, issues and proceeds of all such property, shall remain her own, and may be used, invested, and disposed by her as she deems best, free from control of her husband and without liability for his debts. Herein says the federal court, in deciding the above mentioned case—Texas & Pacific R. R. Co. v. Humble—is found a clear authority by inference for a married woman to engage in trade or in any business which she may elect to pursue, the same as a *feme sole*, and to hold whatever property she may thus acquire as her own, free from the control or interference of her husband. The question does not appear to have been decided by the local courts whether in view of the statute, a married woman suing for a personal injury in the State of Arkansas may lay claim to compensation for a loss of earning capacity, but the court of appeals in the case cited decides that she has such claim. It seems to follow logically from the authority given to her to carry on any business as a *feme sole*, and to appropriate the proceeds of her labor, that a loss of earning capacity incident to a personal injury is a loss for which a married woman is entitled to demand reasonable compensation from the wrongdoer. As she is entitled to enjoy the fruits of her own labor without participation by the husband, a wrongful or negligent act which lessens her capacity to labor inflicts a loss on account of which she should be entitled to recover, as well as for the pain and suffering which was occasioned by the injury. The precise question here involved has recently undergone judicial consideration in the State of Massachusetts, whose laws concern-

ing the rights of married women are substantially the same as in the State of Arkansas. Harmon v. Railroad Co., 165 Mass. 100, 104, 42 N. E. Rep. 505. It was there held, in substance, that the right conferred on married women by the statutes of that State to engage in trade and business on their own account, and to enjoy the fruits of their own labor, is inconsistent with the theory that a married woman's capacity to labor belongs exclusively to her husband, and as a corollary from that proposition, it was decided that, in an action by a wife for personal injuries, the jury were entitled to consider to what extent, if any, the injury sustained had impaired her capacity to labor. The Supreme Court of Montana appears to have adopted a similar view in Hamilton v. Railway Co., 17 Mont. 334, 42 Pac. Rep. 860, and 43 Pac. Rep. 713. See also Jordan v. Railroad Co., 138 Mass. 425.

NOTES OF IMPORTANT DECISIONS.

CARRIERS OF PASSENGERS — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE.— In Bullock v. Houston, E. & W. T. Ry., 55 S. W. Rep. 184, decided by the Court of Civil Appeals of Texas, it was held that where a passenger left her train and boarded another, at a meeting point, to converse with another person, she cannot recover for injuries sustained through negligence of the company while she was leaving the latter train, in the absence of proof that the employees operating such latter train knew of her presence, and that it was only temporary, although the conductor of the train upon which she was actually a passenger consented to her boarding the other train. The court said in part:

"In this case the court directed a verdict for the defendant. The testimony shows, on behalf of plaintiff, that she, in company with her brother-in-law, was a passenger on defendant's south-bound train from Nacogdoches to Houston. After midnight her train arrived at Fant Station about fifteen minutes before the other. In order to see her sister, who was to be on the north-bound train that night, Whitehead, the conductor of her train, an obliging officer, escorted her and her brother-in-law to the engine, which she was allowed to board to keep warm, it being a cold night, until the other train arrived. When it did arrive, she was helped to the platform of the coach next to the baggage car, by her brother-in-law, and she and her brother-in-law went through that coach, and, not seeing the sister as expected, returned to the platform, and while there, in the act of getting off, the train was moved with a sudden and severe jolt, and she was thrown off, and suffered a severe sprain of the ankle. They were not on the train any longer than to pass through it and return to the platform. For this injury the action was brought.

"The testimony claimed to exist, as showing that the conductor of the north-bound train (Conelly) knew she was on the train for the temporary purpose for which she was there, will be adverted to hereafter. The propositions of appellant are that plaintiff was a passenger on defendant's train, and that she was a licensee on defendant's train, and was injured through the failure of defendant to exercise proper care for her safety. Plaintiff was a passenger on the train upon which she was traveling, and remained such so long as she did not assume a relation or position inconsistent with that relation. It has been held that a passenger may alight at an intermediate station for a temporary purpose of business, exercise, or curiosity, without losing his *status* as a passenger. Railway Co. v. Overfield (Tex. Civ. App.), 47 S. W. Rep. 684. A person remains a passenger while going from one train to another in the prosecution of his journey. But here the plaintiff left her train altogether, and went upon another for a purpose that had no connection with her journey, and inconsistent with the relation of passenger which she sustained to defendant. Certainly she could not be regarded as a passenger of the north-bound train, and while she was upon said train she had for the time being ceased to be a passenger on her own. The fact that her conductor accompanied her and consented to her act in boarding the north-bound train cannot be treated as the act of the company; for the uncontradicted testimony is that his authority was limited to the conduct and operation of his own train, and this, we may say, was the extent of his ostensible authority. Railway Co. v. Cooper, 88 Tex. 607, 32 S. W. Rep. 517; Railway Co. v. Anderson, 82 Tex. 520, 17 S. W. Rep. 139; Railroad Co. v. Carper, 112 Ind. 26, 13 N. E. Rep. 122, and 14 N. E. Rep. 352; Shear. & R. Neg. sec. 148. It is and was evident that, in accompanying her to the other train and placing her upon it, he was not serving the defendant, and, no special authority being shown, it cannot be treated as the act of defendant. Not being a passenger when hurt, no duty devolved upon the defendant's servants operating the train she was on, in the absence of notice to them of her presence and temporary purpose there, except to refrain from knowingly or wantonly injuring her. At stations where the journey begins and ends it is decided that one may accompany a passenger to a seat on the train, and while so engaged is entitled to reasonable precaution for his safety in going upon and alighting from the train; but, even in such cases this duty does not arise unless the defendant's servants are in some manner informed of the presence of such person on the train and of his purpose.

Railway Co. v. Satterwhite, 15 Tex. Civ. App. 103, 38 S. W. Rep. 401. Whether or not, when a person goes upon the train at an intermediate point of the journey to visit the passenger, the same duty is, under like circumstances, imposed upon the carrier, it is not necessary for us to discuss in this case. It was, at all events, incumbent on plaintiff here to show that the conductor or some employee engaged in the operation of the north-bound train knew, not only that she was upon the train, but that she was there temporarily, and expected to alight. That the conductor of her train knew this was not sufficient. It was essential to plaintiff's case that she prove that some employee of the train upon which she was hurt, knew, before her injury, that she had boarded it, intending not to travel therein, but to see her sister, and then alight. No case of intentional or wanton injury upon her was shown, and this is not claimed."

NUISANCE—OIL AND GAS WELLS—ABATEMENT.—The Supreme Court of Appeals of West Virginia decide, in McGregor v. Camden, that oil and gas wells are not nuisances *per se*. Whether they are nuisances to a dwelling house and its appurtenances depends on their location, capacity and management; that when such a well has such capacity, management and location with regard to a dwelling house and its appurtenances as to materially diminish the value thereof as a dwelling, and seriously interfere with its ordinary comfort and enjoyment, it is an abatable nuisance, and that if there is any way that such well can be operated so as not to make it such nuisance, only the unlawful operation thereof will be enjoined. The court said in part:

"The main facts on which the bill is founded are not even denied, the only controversy between the parties being the question as to whether a gas and oil well can be so sunk and operated as not to be a nuisance to a dwelling house and lot within 70 feet of it. The bare statement of the case would apparently make it *prima facie* a nuisance. The noise and rumbling of steam-running machinery at all hours, both day and night, until they become accustomed to it, would be a great source of annoyance to most persons; and then the inflammable, destructive, and dangerous character of both oil and natural gas issuing from a producing well, and discharged in the air or stored in quantities, are matters of common understanding; and when situated so near a dwelling house and grounds as to become an impending and threatening danger to the property and inmates thereof, so the proper enjoyment of such property is greatly interfered with, if not entirely destroyed, a court of equity is justified in abating the same as a nuisance, unless it appears that such well can be operated without danger to such dwelling house. Nor can this matter be determined by waiting until the property is actually destroyed. Such delay would be in its nature criminal. A lawful business cannot be a nuisance *per se*, but from its surrounding places and circumstances, or the manner in which it is conducted, it may become a nuisance. Manufacturing Co. v. Patterson, 148 Ind. 414, 47 N. E. Rep. 2, 37 L. R. A. 381; Powell v. Furniture Co., 34 W. Va. 804, 12 S. E. Rep. 1085, 12 L. R. A. 53; Kinney v. Keopmaun (Ala.), 22 South. Rep. 593, 37 L. R. A. 497; Wilson v. Manufacturing Co., 40 W. Va. 413, 21 S. E. Rep. 1035. The last case refers to the keeping and manufacturing of powder near a public place. In the case of McAndrews v. Collerd, 42 N. J. Law, 189, it is held that the 'keeping powder, nitroglycerine, or other explosive substance in large quantities in the vicinity of a dwelling house or other place of business is a nuisance *per se*, and may be abated by action at law or bill in equity.' This is quoted approvingly by Judge Brannon in the case of Wilson v. Manufacturing Co., above cited. In the case of Cook v. Anderson, 85 Ala. 99, 4 South. Rep. 713, it was held that 'keeping explosive substances in large quantities in the vicinity of dwelling houses or places of business is ordinarily regarded as a nuisance,—whether or not being dependent upon the locality, the quantity, and surrounding circumstances.' If the keeping of such substances, which necessarily include oil and natural gas, near a dwelling house or place of business, may be a nuisance, what may be said of boring into the earth, and turning them loose from their safe confinement, and allowing them to spread *ad libitum* over and through a dwelling house? Natural gas is known to be easy ignitable and highly explosive, and to be very dangerous, owing to its stealthy and rapid approach. Naptha gas, arising from crude petroleum oil, is said to be more explosive than powder. In this case we have the natural gas from the well, petroleum, and the gas therefrom in its storage tank, all to deal with as dangerous and threatening to plaintiffs' property. As the drilling has ceased, the noise attending it has, likewise, except that arising from the pumping operation, about which nothing is alleged or proven.

"The bills, on demurrer, make out a strong case of nuisance against the defendants, and therefore the demurrer should have been overruled. They do not allege, however, that this well cannot be operated without danger or loss to plaintiffs' property, although there are allegations from which this might be implied. Nor is this a matter of common knowledge, as there is little, if any, human experience to be had in this direction, as but few oil wells have ever been located in so close proximity to a valuable home property. The evidence of the most expert and competent witnesses could alone shed light on this subject. The court cannot say without such evidence that the well could be operated without such danger and loss. The drilling of oil and gas wells is not only a legitimate business, but public policy upholds it as being for the general welfare. Uhl v. Railroad Co. (decided at this term), 34 S. E. Rep.

934. Yet public policy itself is qualified by the constitutional provision that private property shall not be taken or damaged for public use without just compensation. So public policy will not justify the maintenance of an oil well that is a nuisance to private property. The defendant, Kelly, who appears for all the defendants, admits many of the allegations of the bill, denies that it has so far damaged the plaintiffs' property to any considerable extent; alleges that the well 'is a paying well, and is now being operated with all the prudence, care and skill known in the business,' but does not claim that such well can be so operated as to prevent any appreciable danger to plaintiffs' property from fire and gas. The proofs appear to establish the fact that the well and tank are an impending evil, continually hanging over the plaintiffs' property,—as much so as the storage or manufacture of powder in quantities could possibly be,—and that it is in danger of destruction by fire by day and by night. There are no waterworks or fire protection of any kind, and if fire once got under headway it would be impossible to stop it until stayed by the entire destruction of all plaintiffs' buildings, and, if in the nighttime, probably life itself. It is a hardship to stop the pursuit of any lawful business, and equity does not do it except in a plain case. If the business is merely for pecuniary profit, and threatens loss to another which cannot be compensated in damages, such as the destruction of an old, established home, the speculator has no right to complain because he is restrained from doing acts lawful in themselves, but which become unlawful because they ruthlessly interfere with the long-established rights of his neighbor. He must use his own without damaging his neighbor."

THE ADMISSIBILITY OF EVIDENCE GIVEN ON A FORMER TRIAL WHEN THE WITNESS IS ABSENT FROM THE STATE ON A SUBSEQUENT TRIAL OF THE SAME CASE.

The purpose of this article is to give a clear and concise arrangement of the weight of the authorities as it appears in the decisions of the courts of the various States, upon the question of the admissibility of evidence given on the former trial when the witness is beyond the jurisdiction of the State on a subsequent trial of the same case. We will assume that the reader understands that the subsequent trial is relative to substantially the same subject-matter, between the same parties or their privies in law, that the defendant had, on the former trial, an opportunity to cross-examine the witness whose testimony is offered on the subsequent trial, and that the party offering the evidence has made a diligent search for the witness and is unable to find him. These assumptions are necessary that the question forming the subject of this investigation may arise. Such evidence clearly comes within the category of hearsay, and, therefore, that it may be admitted, it is necessary that the many objections to hearsay be absent on its admission. The principal objections to hearsay evidence are: 1. It supposes some better testimony. 2. It is naturally weak and fails to satisfy the mind of the existence of the fact which it offers to prove. 3. It affords an opportunity for fraud. 4. It removes the opportunity for cross-examination. 5. In criminal cases it has been held to be contrary to the constitutional provision that the accused shall enjoy the right to meet the witness against him face to face; this last, however, has been disproved by good authority. The fourth objection above mentioned is the only one that applies to the exception of which we are writing, and, therefore, the subject is so limited that evidence of this character is excluded, unless the opposite party has had an opportunity to cross-examine the witness on the former trial.[1]

It was decided in 1818,[2] in an action of ejectment, that such evidence was admissible. The court of common pleas admitted evidence of what had been sworn by David Nelson, a witness examined on a former trial between the same parties wherein the same matter was in issue; said Nelson being a resident of Ohio at the time of the second trial. It was held, on appeal, that the evidence was properly admitted, and although there was no express decision on this point, reasoning from analogy, light might be derived from the case of Clark v. Sanderson.[3] This latter case held that where a subscribing witness to an instrument of writing is out of the State, his handwriting may be proved, although the general rule is that if the witness be living he must be examined. Tilgman, J., speaking for the court, says: "To preserve consistency of principle it seems to me that, in the present instance, we should consider the residence of the witness in the State of Ohio the same

[1] Charlesworth v. Tinker, 18 Wis. 633.
[2] Magill v. Kaufman, 4 Serg. & R. 317.
[3] 3 Binn. 192.

thing as his death, for the purpose of letting in the evidence of which he swore on the former trial." This is a Pennsylvania case, and the justice of the ruling has never been questioned in that State. In a recent and interesting case on this subject[4] the plaintiff had been in litigation with another person, and had given testimony to the effect that the money represented by the certificate belonged to R. H. Wright and not to himself. The defendant desired to prove the admission thus made, and called as a witness the official court stenographer who had taken the plaintiff's testimony in the former trial. This witness produced the notes taken by him of the testimony in question, and said that he knew he had taken such testimony correctly, but he had no recollection of it so as to give even its substance correctly, but he could give it by reading from his notes; that, independent of such notes, he had a recollection of some striking features in the testimony, but he would not undertake to give anything like the substance of it without referring to them, although he remembered certain expressions witness used. It was held that the witness might not only refresh his memory from the notes but might read them *verbatim* as he copied them at the trial; but he must, before reading his notes, be able to swear positively as to their truth and accuracy. It has been held that where a witness has removed from the State his testimony taken and preserved at a former trial is admissible, although no diligence was exercised to procure the deposition of such witness. This case held that the evidence taken on the former trial is entitled to as much weight as the deposition of the witness taken in another State.[5] The plaintiff, for the purpose of showing what certain of the defendant's witnesses testified to at the coroner's inquest held to inquire as to the cause of E's death, called the stenographer who had taken the testimony at the inquest, and she was permitted to state, by reference to her notes, what such witness testified to. This was assigned as error, but on appeal it was held that the evidence was properly admitted. The stenographer in this case was shown to be experienced, and she testified that she took the testimony correctly at the coroner's inquest.[6] On a third trial the defendant attempted to read in evidence the testimony of one Luke Sweet, given on the first trial of the cause. The court objected to that, but allowed the evidence of the same witness given on the second trial. It was held on appeal that there was no error in this ruling.[7] In another case[8] the question to be decided was, whether the testimony of a witness given upon a former trial of the same case is admissible in evidence, simply on a showing that the witness is out of the jurisdiction and beyond the reach of the court's process. The case holds that the evidence is admissible, and Irwine, J., who writes the opinion of the court, discusses the rule very fully *pro* and *con*, and finally arrives at the opinion above stated. The foregoing cases state the rule as it is to-day in nearly every State in the Union in civil cases.

Criminal Cases.—In criminal cases the rule is not so well settled. In Finn v. Commonwealth,[9] decided in 1827, it is held in the following language: "In a civil action, if a witness who has been examined on a former trial between the same parties, and on the same issue, is since dead, what he swore on the former trial may be given in evidence, for the evidence was given under oath, and the opposite party had an opportunity to cross-examine the witness. But we cannot find that the rule has ever been allowed in a criminal case; indeed, it is said to be expressly otherwise. Nor can we find that the rule in civil cases extends to the admission of evidence formerly given by a witness who has removed beyond the jurisdiction of the country; much less can it be admitted in a criminal case." It will be observed that the court in this case overlooked the case of Magill v. Kaufman,[10] decided in 1818. Brogy's case is another Virginia case decided in 1827, and holding the same rule as the case of Finn v. Commonwealth.[11] But if the prisoner procure the absence of the witness and the testimony, he thereby waives his constitutional right to meet the witness face to face, and in such case evidence given on the former trial is admissible on a subsequent

[4] Wright v. Wright, 50 Pa. 444.
[5] Emerson v. Brunett, 52 Pa. St. 752.
[6] Stahl v. City of Duluth, 74 N. W. Rep. 143.
[7] Schindler v. Ry. Co., 87 Mich. 413.
[8] The Omaha St. Ry. v. Elkins, 58 N. W. Rep. 164.
[9] 5 Rand. 701 (Va.).
[10] 4 Serg. & R. 317.
[11] Collins v. Com., 12 Bush, 271.

trial.[12] The rule in Alabama is the same in criminal as in civil cases, and favors the admission of evidence given on the former trial, if the witness has left the State permanently or for such a length of time that his return is uncertain.[13] In the above case the evidence was not admitted on the trial, but there the rule is very ably discussed by Brickell, C. J. In a note to Greenleaf on Evidence[14] it is observed, "that if the witness is gone no one knows where, and his place of abode cannot be ascertained by diligent inquiry, the case can hardly be distinguished from that of his death; and it would seem that his former testimony ought to be admitted." The following language is used by Mr. Starke on this subject: "It is an uncontrovertible rule that when the witness may be produced his deposition cannot be read, for it is not the best evidence, but the deposition of the witness may be read, not only when it appears that the witness is actually dead, but that he is dead for all purposes of evidence; as where diligent search has been made for him and he cannot be found; where he resides in a place beyond the jurisdiction of the court, or where he has become a lunatic or attainted.[15] In People v. Fish[16] defendant was convicted of murder in the first degree on the 24th day of May, 1890, for the killing of Jno. Cullnane. Maltham, one of the most important witnesses for the State, was sworn on a preliminary examination before the police justice; the defendant was there with counsel who cross-examined the witness; the examination was reduced to writing, read over to him, subscribed by him and properly certified. The witness was subpœnaed to attend the trial, and not appearing the district attorney, against the objection of the defendant's counsel, was permitted to read the deposition in evidence. He claimed the right to read it under the code of criminal procedure which provided, "that the defendant in a criminal action is entitled to procure witnesses against him in the presence of the court, except when the charge has been preliminarily examined before a magistrate, and the testimony reduced by him to the form of a deposition in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, or when the testimony of a witness on the part of the people has been taken, according to sections 219 and 220, the deposition may be read, upon it being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the State. Maltham had been duly served with a subpœna, and had announced his intention to be present at the trial on the day appointed. He was not present at the trial, and the undersheriff inquired of his friends and relatives, but was unable to ascertain witness' whereabouts. The court held that there was sufficient diligence exercised, and the evidence was admitted. It was urged that the admission of the evidence was contrary to the constitutional provision securing to the accused the right to meet the witness face to face. But the court say "this constitutional provision was not intended to secure to the accused person the right to be confronted with the witness against him upon his final trial, but to protect him against *ex parte* affidavits and depositions taken in his absence, as was frequently the practice in England at an early day." The above case follows the rule laid down in an earlier case.[17]

New York provides[18] that the deposition, or a certified copy thereof, may be read in evidence by either party on trial upon it appearing that the witness is unable to attend, by reason of his death, insanity, sickness or infirmity, or by his continued absence from the State. From the foregoing cases and statutes it seems clear that the rule in New York is favorable to the admission of evidence given on the former trial when witness is without the State on a subsequent trial of the same case. People v. Williams[19] holds that article six of the amendment to the United States constitution, conferring on the accused the right to be confronted with the witness against him, does not apply to proceedings in State courts, but only to such as were instituted in the United States courts. The Penal Code of California on this subject is very similar to that of New York; yet in California it has been repeatedly held that the stenographer's

[12] Reynolds v. United States, 98 U. S. 74.
[13] 106 Ala. 67, and cases there cited.
[14] Green. Evidence (14 Ed.), sec. 163.
[15] Lowe v. State, 86 Ala. 47; McNamara v. State, 60 Ark. 400. Same rule in State v. Riley, 42 La. Ann. 995.
[16] 125 N. Y. 136.
[17] People v. Williams, 35 Hun, 516.
[18] 35 Hun, 516.
[19] Code of Crim. Proc. (N. Y.) sec. 631.

notes taken on the former trial are inadmissible.[20] The Code of California secures to the accused the right to be confronted with the witness against him, except that a deposition regularly taken may be admitted when the witness is shown to be dead, insane, or cannot after due diligence be found within the State. This statute provides for the admission of depositions in the cases named, and the courts hold that the stenographer's notes are (not being named) excluded. The rule which, upon a new trial, admits proof of what a witness since deceased testified to at a former trial, would seem, upon principle, to include as well the testimony of a witness who had since the last trial gone beyond the jurisdiction of the State.[21] The later cases on this subject in California admit depositions, but not the notes taken by stenographers. There seems to be no good reason for this distinction, as the person reducing the deposition to writing is as liable to make mistakes as is the stenographer who reduces to writing the testimony given on the trial.[22] Pennsylvania, by act of legislature of May 23, 1887, provides as follows: "Whenever any person has been examined as a witness, either for the commonwealth or for the defense, in any criminal proceeding conducted in or before a court of record, and the defendant has been present and had an opportunity to examine or cross-examine, if such witness afterward die, or be out of the jurisdiction, so that he cannot be effectually served with a subpœna, or if he cannot be found, or if he becomes incompetent to testify for any legal sufficient reason properly proven, notes of his evidence shall be competent upon a subsequent trial of the same criminal issue; but, for the purpose of contradicting a witness, the testimony given by him in another or a former proceeding may be orally proven. The court admitted over defendant's objection the evidence of one McConnell, taken on the former trial, but who had since left the State;[23] and also admitted the evidence taken before a county magistrate of a witness since deceased, and approved the case of Commonwealth v. Cleary.[24]

The twelfth article of the declaration of rights which provides that, in criminal cases, the accused shall have the right to meet the witness face to face, is not violated by the admission of testimony in a criminal trial before a jury, to prove what a deceased witness testified at the preliminary examination of the accused before a justice of the peace.[25] In the case of Fertig v. State[26] the testimony of the accused, given in a somewhat different relation of the homicide upon the former trials, was read from the reporter's notes, by consent, without such notes being verified; and on appeal it was held not error. This case brings up the case in a slightly different form, but it shows the general trend of judicial opinion upon this subject. From the foregoing summary of the decisions on this subject there can be no doubt, that upon reason there is no valid objection to the admission of stenographer's notes taken at the trial by an official stenographer sworn to truthfully take the testimony given at the trial. Depositions used on former trials are held to be admissible on subsequent trials, and the fallibility of humanity is as liable to be present there as in the case of stenographers' reports; the prisoner is as likely to suffer an injustice upon the admission of the one as upon the admission of the other.

In conclusion this subject may be summarized as follows: In civil cases the evidence given on the former trial is admissible on a subsequent trial of the same case, whether such evidence be in the form of depositions or stenographic reports taken by an official stenographer or the notes of a judge at the prior trial. In criminal cases the decisions are irreconcilable. It may be said, however, that the tendency of modern decisions is to relax and to admit, on a subsequent trial, the evidence given on the former trial, whether it be depositions or stenographer's notes; and the States of New York, California, Iowa, and Texas have provided in their criminal codes for the admission of deposition regularly taken on the former trial.

Marinette, Wis. R. G. HUTCHINSON.

[20] People v. Gordon, 99 Cal. 233; People v. Gardner, 98 Cal. 127.

[21] People v. Devine, 46 Cal. 46.

[22] People v. Chung Ah Chue, 57 Cal. 567; People v. Sierp, 116 Cal. 249; People v. Cady, 48 Pa. 908.

[23] Com. v. Cleary, 148 Pa. St. 38; Com. v. House, 28 Pittsb. Leg J. 210 (1897); Com. v. Richards, 18 Pick. 434.

[24] 148 Pa. St. 38.

[25] State v. Cushing, 50 Pa. 512, 17 Wash. 960.

[26] 75 N. W. Rep. 960 (Wis.). Other cases: Wilder v. St. Paul, 12 Minn. 192; Summons v. State, 5 Ohio St. 325; Renolds v. Powers, 96 Ky. 481; Atlantic, etc. Ry. Co. v. Gravitt, 93 Ga. 369, 44 Am. St. Rep. 145; Monroe Bank v. Gifford, 79 Iowa, 300.

INSURANCE—RECORD AS NOTICE TO INSURER —WAIVER OF CONDITION AGAINST INCUMBRANCE.

TRADERS' INS. CO. v. CASSELL.

Appellate Court of Indiana, Feb. 23, 1900.

1. The public record of a chattel mortgage on insured property is not notice thereof to the insurer.

2. A policy provided for its forfeiture in case of incumbrance without insurer's consent, and withheld from the agent issuing the policy power to waive any of it terms. Before loss, insured executed chattel mortgages on stock covered by the policy. Neither the local agent nor the company knew of the mortgages before the fire. The local agent learned of the mortgages after the fire, and told insured that the policy was voided by execution of the mortgages, and that the insurer would send an adjuster to adjust the loss. The local agent notified the company of the loss, but said nothing about the mortgages. After proceeding with the adjustment for some time, the adjuster, without being informed by insured of the existence of the incumbrances, learned of the mortgages, and denied the company's liability. Held, that there was not a waiver of the forfeiture condition in the policy.

ROBINSON, J.: The policy of fire insurance upon which this action is based provides, among other things, that "if the property be sold, transferred, or is or becomes incumbered by mortgage or trust deed, * * * or upon its passing into the hands of a receiver, or if this policy be assigned before a loss, then, and in every such case, this policy shall, without the written consent of this company thereto be indorsed hereon, become absolutely void." It also provides that neither the agent who issued the policy, nor any other person, except the company's secretary, has authority to waive any terms of the policy, nor is the agent's assent to an increase of risk binding on the company until indorsed on the policy, "nor, in the event that this policy shall become void by reason of the non-compliance with any of the terms or conditions hereof, shall the agent have power to waive or revive the same; and any policy so made void shall remain void and of no effect, any contract, by parol or otherwise, or understanding with the agent, to the contrary notwithstanding." The policy was issued by appellant's local agent, January 30, 1896, for one year. The property burned December 29, 1896. The insured placed three chattel mortgages on the property,—one dated November 23, 1896, and two dated December 4, 1896. Neither the local agent nor the company knew of the mortgages until after the fire. The resident or local agent testified that he learned of the mortgages after the fire; that he went to the scene of the fire in response to a request from the insured; that he told them he was sorry the complications had arisen, but that the placing of mortgages on the stock had voided the policy, and that they had no claim upon the company; that he had no authority to speak for the company, and had nothing to do with the adjustment of it; that he would report the loss to the company, and that they would send a person specially authorized to attend to that class of business, and that he would make a proper disposition of the matter. One of the firm insured testified that the local agent asked about the mortgages, and witness told him, and gave him the amount; that the agent then said he was sorry to find it in that condition; that the condition of the policy had been violated, but that he would write a complete statement of the matter to the company, and advise them to treat the insured fairly, as it was an honest loss; that the agent gave no directions as to what should be done with the stock, or anything of that kind. The other member of the firm testified that the agent said to him that he was sorry to find the stock mortgaged; asked the witness if it was mortgaged, and witness said it was; that the agent said that he was going to do the best for them he could; that he would go home, and notify the company, and give them a full statement of it. It further appears that the local agent notified the company of the loss by letter, but said nothing about the mortgages; that the company, acting upon this notice, sent its adjuster to the place of the fire, who at the time knew nothing of the mortgages; that he instructed the insured to write for bills and invoices, the same having been burned; to put the goods not destroyed in as good shape as possible; to advise him when they were ready, and he would return. The insured sent for bills and invoices, put the goods in shape, and notified the adjuster. When he returned the second time, he did not yet know of the mortgages, and entered upon a consideration of the loss. Before proceeding far he learned of the mortgages, and then denied the company's liability.

Several questions are presented, but the question upon which the appeal practically rests is whether, upon the facts, the company is estopped from claiming a forfeiture of the policy because of the execution of the chattel mortgages. The public record of a chattel mortgage upon insured property is not notice thereof to the insurer. Insurance Co. v. Overman, 21 Ind. App. 516, 52 N. E. Rep. 771; Shaffer v. Insurance Co., 17 Ind. App. 204, 46 N. E. Rep. 557. If the insurer, with the knowledge of the facts constituting a forfeiture, continues to treat the contract as in force, and induces the insured to incur expenses and trouble while acting in that belief, the insurer is estopped to take advantage of the forfeiture. An insurance policy is a contract, and the insured accepts it with knowledge of all its conditions and stipulations. In the absence of any fraud or mistake, the insured is conclusively presumed to know its contents. The condition against chattel mortgages is valid, and one which the company could rightfully insert in its policy, and insist upon as a defense. The rules against a forfeiture are

very liberal, but they are not so liberal as to authorize a court to make a contract for the parties, or to disregard one the parties have made for themselves. In the case at bar the execution of the chattel mortgages, without the company's knowledge or consent, voided the policy, and unless the stipulation against mortgages was waived, there can be no recovery. See Havens v. Insurance Co., 111 Ind. 90, 12 N. E. Rep. 137; Insurance Co. v. Lamar, 106 Ind. 513, 7 N. E. Rep. 241; Insurance Co. v. Niewedde, 12 Ind. App. 145, 39 N. E. Rep. 757; Bowlus v. Insurance Co., 133 Ind. 106, 32 N. E. Rep. 319; Geiss v. Insurance Co. 123 Ind. 172, 24 N. E. Rep. 99; Insurance Co. v. Kyle, 124 Ind. 132, 24 N. E. Rep. 727; Insurance Co. v. Vanlue, 126 Ind. 410, 26 N. E. Rep. 119; Hankins v. Insurance Co., 70 Wis. 1, 35 N. W. Rep. 34; First Nat. Bank v. American Cent. Ins. Co., 58 Minn. 492, 60 N. W. Rep. 345. If the company's local agent at the time the policy was issued, or at any time before the loss, knows of the violation of conditions of the policy, the knowledge of the agent is the knowledge of the company, and after the loss the company cannot defend because of such breach of the contract. To this effect are the following cases cited by counsel for appellee: Forward v. Insurance Co., 142 N. Y. 382, 37 N. E. Rep. 615; Insurance Co. v. Hart, 149 Ill. 513, 36 N. E. Rep. 990; Insurance Co. v. Cary, 83 Ill. 453; Carpenter v. Insurance Co., 135 N. Y. 298, 31 N. E. Rep. 1015; Bennett v. Insurance Co., 70 Iowa, 600, 31 N. W. Rep. 948; Insurance Co. v. Stanton, 56 Ill. 354; Moffitt v. Insurance Co., 11 Ind. App. 233, 38 N. E. Rep. 835. But the principle declared in these cases is not applicable to the facts in the case at bar. An examination of the other cases cited by appellee's counsel also shows a materially different state of facts from those in the case at bar. In Brown v. Insurance Co., 74 Iowa, 428, 38 N. W. Rep. 135, the company placed the claim for loss in an adjuster's hands, who, knowing the insured had not kept his books and inventories as required by the policy, required him to procure copies of bills and invoices of his purchases, held to amount to a waiver of the forfeiture. In Insurance Co. v. Kittle, 39 Mich. 51, an adjusting agent, with knowledge of additional insurance, waived for the company, a forfeiture of the policy by putting the insured to the expense of making proofs of loss without giving him to understand that the company would rely on the forfeiture. In Titus v. Insurance Co., 81 N. Y. 410, the company, after the loss, and after it had notice through an agent sent to investigate the loss, of foreclosure proceedings which forfeited the policy, required the insured to appear and be examined. Held a waiver of the forfeiture. In Cannon v. Insurance Co., 53 Wis. 585, 11 N. W. Rep. 11, the company, after knowledge, through its adjuster, of breach of a condition in the policy, by requiring proofs of loss waived the forfeiture of the policy. In Oshkosh Gaslight Co. v. Germania Fire Ins. Co., 71 Wis. 454, 37 N. W. Rep. 819, an adjuster, with knowledge of facts working a forfeiture, continued to recognize the validity of the policy, and entered into negotiations for a settlement, whereby the insured was put to expense and trouble. In Eagle Fire Co. v. Globe Loan & Trust Co., 44 Neb. 380, 62 N. W. Rep. 895, the company, after the loss, with knowledge of additional insurance, submitted the amount of the loss to arbitration. The opinion sets out the evidence as to the knowledge the company had of additional insurance prior to the loss, which shows the local agent only had knowledge; but it is not clear whether the company afterwards had actual knowledge, although it is stated that the company submitted the loss to arbitration, having knowledge of the additional insurance, and that the company canceled the policy and refunded the unearned premium. In Insurance Co. v. Hinesley, 75 Ind. 1, it was held that knowledge by the resident agents of a foreign insurance company of delay in the payment of premiums was knowledge by the company. A corporation is not charged with information casually obtained by its agent. Shaffer v. Insurance Co., 17 Ind. App. 204, 45 N. E. Rep. 557; Union Nat. Bank v. German Ins. Co., 71 Fed. Rep. 473, 18 C. C. A. 203. But if in such case the corporation act through such agent in a matter where the information possessed by him is pertinent, the agent's information becomes the principal's. Willard v. Denise, 50 N. J. Eq. 482, 26 Atl. Rep. 29. Knowledge of an agent concerning a matter about which the insured knows he is not authorized to act, and in respect of which he does not act in behalf of the company, is not ground of estoppel. See 1 May, Ins. (3d Ed.) § 153; Mitchell v. Ins. Co., 51 Pa. St. 402. The local agent who wrote the policy had authority to receive applications, write and cancel policies, and collect premiums, but there is nothing to show he had any authority in the premises after a loss. Whatever may have been his powers with reference to issuing policies and the like, no inference arises therefrom that he had authority to adjust and settle losses. 2 Wood, Ins. (2d Ed.) § 429; Bush v. Insurance Co., 63 N. Y. 531; Lohnes v. Insurance Co., 121 Mass. 438; Smith v. Insurance Co., 60 Vt. 622, 15 Atl. Rep. 353.

But we do not think it necessary to inquire into the extent of such agent's authority generally, nor by virtue of the certificate of authority issued under the statute by the auditor of state (section 4915, Burns' Rev. St. 1894; section 3765, Horner's Rev. St. 1897), because the insured were notified immediately after the fire, and as soon as the agent learned of the mortgages, that he had no authority to speak for the company upon the effect of the mortgages, and nothing to do with the adjustment of the loss. 2 Wood, Ins. §§ 411, 420; Insurance Co. v. Fay, 22 Mich. 467. In Insurance Co. v. Crutchfield, 108 Ind. 518, 9 N. E. Rep. 458, it appeared that after the loss the local agent and the adjuster were acting together concerning the

loss. The insured had two conversations with the adjuster in the local agent's presence and in the latter's office. Two days after the adjuster left, the insured tendered plans and specifications and proof of loss to the local agent, who refused to receive them. "Elsewhere," said the court, "it appeared that Rosencrans, the local agent, was probably acting under the instructions of Smith, the adjuster, in refusing to receive the proof of loss when tendered by the assured. According to the evidence, Smith was apparently determined to baffle the assured, and keep him out of the money due on his policy." In reaching the conclusion, in that case, that it could be reasonably inferred that the assured had substantially complied with the conditions of the policy, the court said: "*A fortiori*, should it be said, we think, that the tender by the assured of his proofs of loss to the agent of a foreign insurance company, who countersigned and issued to the assured his policy, and who, so far as appears, was the only officer or agent of such company in this State, and the unexplained refusal of such agent to accept such proofs of loss without objection thereto was a sufficient compliance by the assured with the conditions of his policy." In the case at bar the local agent told the insured he had no authority to adjust the loss, and that the company would send an agent to attend to that. There was no "unexplained refusal" of the local agent to act in the case at bar. The insured had no right to rely upon any apparent authority of the agent, because the agent said at the time he had no authority. There is nothing in the record to show that the company at any time, through its proper agents, having knowledge of the facts, did anything to mislead the insured. They were not induced to act upon any false representations. No act was done, with knowledge of the forfeiture, which necessarily operated as a recognition of the validity of the policy. When the agent promised to write the company, he did it at the insured's request, and when the insured had been told that the agent had no authority to speak for the company as to the effect of the mortgages and nothing to do with the adjustment of the loss. The agent having authority to adjust the loss came as the insured were informed he would come. He entered upon an adjustment of the loss without any knowledge of the mortgages or that the local agent knew of them. The insured knew the mortgages voided the policy, the local agent told them so, and the policy said so. They knew the adjuster had power to adjust the loss, and that the local agent had not, but they avoided mentioning the mortgages to the adjuster. Knowing, so far as they had communicated the facts to any agent of the company, that their policies were invalidated, they incurred expense and trouble without disclosing the facts to the agent who they knew had authority to settle the loss. Under such conditions we cannot say that the company is estopped from claiming a forfeiture of the policy. It is not claimed that the adjuster did or omitted to do anything after he received the information of the mortgages which operates to estop the company from asserting the forfeiture as a defense. See Hosford v. Johnson, 74 Ind. 479. The verdict is not sustained by sufficient evidence, and the motion for a new trial should have been sustained. Judgment reversed.

NOTE—*Recent Cases on Avoidance of Policy of Insurance on Account of Existing Incumbrances.*—A provision against future incumbrances is not broken by a renewal of a prior mortgage, with accrued interest added. Kansas Farmers' Fire Ins. Co. v. Saindon, 52 Kan. 486, 35 Pac. Rep. 15. A provision of an insurance policy against future incumbrances is not violated by a mere subsequent renewal of a prior mortgage, with accrued interest. Kansas Farmers' Fire Ins. Co. v. Saindon (Kan.), 36 Pac. Rep. 983. Where, after probate of a will, the legatee and devisee of certain property thereunder procures insurance on such property running to himself, the fact that the insurer's agent, for the protection of a mortgagee of the testator, afterwards indorses on the policy that the "property is held by and insured in the name of" such legatee and devisee as executor of the will, does not change his interest in the property, so as to prevent a subsequent mortgage by him from avoiding the policy under a provision therein against incumbrances. Kiernan v. Agricultural Ins. Co., 72 Hun, 519, 25 N. Y. S. 438. The "constructive notice to all persons of the rights of the grantee" afforded by the record of a mortgage is no notice of the mortgage to the insurer, so as to make its subsequent acceptance of premium from the mortgagor a waiver of the condition against mortgaging without the insurer's consent. Wicke v. Iowa State Ins. Co. (Iowa), 57 N. W. Rep. 632. Conditions of an insurance policy, declaring the same void for incumbrances, and execution levies, without the consent of the insurer, are valid. Dover Glass Works Co. v. American Fire Ins. Co. (Del.), 29 Atl. Rep. 1039. Where a devisee took property under a will at a certain price, to be paid in annual installments to the other heirs, the property was incumbered, within the meaning of a clause against incumbrances in an insurance policy. Renninger v. Dwelling House Ins. Co., 168 Pa. St. 350, 31 Atl. Rep. 1083. A clause in a lease stating "that said lessor should at all times have a first lien upon all buildings for any unpaid rental or taxes" does not create a chattel mortgage, within the meaning of a stipulation in a policy of insurance on the property that it should be void if the building "be or become incumbered by a chattel mortgage." Caplis v. American Fire Ins. Co. of New York (Minn.), 62 N. W. Rep. 440. Where an insurance policy provides that it shall be void if the property "be or become incumbered," the question whether the execution of a mortgage increased the risk is immaterial. Milwaukee Mechanics' Ins. Co. v. Niewedde (Ind. App.), 39 N. E. Rep. 757. A judgment recovered *in invitum* against insured is not an incumbrance on the insured property, within the condition of the policy against incumbrances "by mortgage, trust deed, judgment, or otherwise." Gerling v. Agricultural Ins. Co., 39 W. Va. 689, 20 S. E. Rep. 691. Though insured incumbered the property after the policy issued, contrary to a condition thereof, he may recover on the policy if, at the time of the loss, it was free from the incumbrance. Omaha Fire Ins. Co. v. Dierks, 43 Neb. 473, 61 N. W. Rep. 740. A breach of condition against incumbrances in the policy on a stock

of merchandise renders the policy void, and it does not become valid as to merchandise placed in the store after the stock was incumbered. Gray v. Guardian Assur. Co., 82 Hun, 380, 31 N. Y. S. 237. A policy of insurance contained a printed condition avoiding it if the subject of the insurance is personal property, and be or become incumbered with a mortgage. Held, that a subsequent written clause, insuring the property held by insured, as "its own or in trust or on commission, or sold but not delivered," did not annul the condition against such chattel mortgage incumbrance. First Nat. Bank v. American Cent. Ins. Co. of St. Louis (Minn.), 60 N. W. Rep. 345. The record of a chattel mortgage does not charge an insurer with notice thereof, so as to render a failure to cancel a policy on the property a waiver of a condition against mortgage incumbrances. Milwaukee Mechanics' Ins. Co. v. Niewedde (Ind. App.), 39 N. E. Rep. 757. A policy of insurance, issued without a written application, contained a clause that the policy should be void if the subject of the insurance was mortgaged personal property. The agent who examined the property made no inquiry whether it was mortgaged. The insured, who acted in good faith, paid the premium, on learning from the agent that the policy had been left at a bank which held a mortgage on the property. The agent did not know of the mortgage, nor the insured of the clause avoiding the policy. The mortgage was registered, and under Sayles' Civ. St., art. 3190, sec. 7, all persons were charged with notice thereof. Held, that the company waived the defense of forfeiture, on the ground that the property was mortgaged when the policy issued. Ætna Ins. Co. v. Holcomb (Tex. Civ. App.), 31 S. W. Rep. 1086. An insurance policy which provides that it shall be void "if there be a mortgage, bill of sale, or other lien" on the property insured, without the fact being indorsed on the policy, is not invalidated by the fact that, at the time of the insurance, there were judgment liens against the property. Georgia Home Ins. Co. v. Schield (Miss.) 19 South. Rep. 94. An agreement in a lease that, on failure to pay rent, buildings, improvements, and other property placed on the premises by the lessee, shall be liable to distraint and sale under warrant, and that such property may be followed and distrained, constitutes an incumbrance on the property placed on the premises by the lessee, within the condition of an insurance policy against incumbrances, though at the time the policy issued no rent was due. Peet v. Dakota Fire & Marine Ins. Co. (S. Dak.), 64 N. W. Rep. 206. Sayles' Civ. St. art. 3190b, sec. 7, providing for filing and indexing chattel liens, instead of recording, as previously required, and that, when so filed and indexed, an instrument shall have the same effect as theretofore given it when fully registered, and "all persons shall be thereby charged with notice thereof," is not intended to enlarge the scope of the notice, which, under the provisions for full registration, extends only to creditors of the mortgagor and subsequent purchasers or incumbrancers in good faith. Such filing will not constitute notice to an insurance company of an incumbrance on insured property. Ætna Ins. Co. v. Holcomb (Tex. Sup.), 34 S. W. Rep. 915. A policy on personalty conditioned that it should be void if "the subject of insurance" be incumbered by a chattel mortgage was not avoided by a chattel mortgage on one of the articles covered by the policy. North British & Mercantile Ins. Co. v. Freeman (Tex. Civ. App.), 33 S. W. Rep. 1091. A false representation by the insured in his application for insurance that there is no lien on the property against the loss of which he wishes to be insured avoids a policy issued upon the application. Queen Ins. Co. of America v. May (Tex. Civ. App.), 35 S. W. Rep. 829. A condition in a fire policy that it shall be void "if the property shall be sold or transferred, or any change take place in the title or possession," does not apply to a mortgage executed before the policy was issued. Cowart v. Capital City Ins. Co. (Ala.), 22 South. Rep. 574. A mortgage to a fictitious person, and not securing any indebtedness, is not a violation of a condition in a fire policy that it shall be void if the property is incumbered. Fitchner v. Fidelity Mut. Fire Assn. (Iowa), 68 N. W. Rep. 710. That the by-laws of an insurance company provide that the policy shall be void if during its life there be any incumbrances so as to reduce the interest of assured to less than the amount of the insurance, without consent of the company, does not affect a clause in a policy thereafter issued providing that it shall be void, unless consent in writing is indorsed thereon, if the interest of assured should thereafter be incumbered. Houdeck v. Merchants' & Bankers' Ins. Co. (Iowa), 71 N. W. Rep. 354. Paying off a mortgage debt, and giving a new mortgage for money borrowed to do so, is no breach of a stipulation not to mortgage. Dougherty v. German-American Ins. Co., 67 Mo. App. 526. A fire insurance policy contained a condition against the incumbrance of the insured property by mortgage, or the commencement of proceedings for its foreclosure or sale. The property was rightfully advertised for sale under an existing mortgage, but the advertisement was withdrawn and no sale occurred. Held, that the policy, though payable to the mortgagee as his interest might appear, was invalidated by the advertisement. Springfield Steam Laundry Co. v. Traders' Ins. Co., 66 Mo. App. 199. The filing of a claim for a mechanic's lien does not show such a lien, *prima facie*, so as to violate a provision in a policy that the property shall not be incumbered. Omaha Fire Ins. Co. v. Thompson (Neb), 10 N. W. Rep. 30. Such condition is not broken by the execution of a chattel mortgage which was never delivered. Neafie v. Woodcock, 44 N. Y. S. 768, 15 App. Div. 618. A provision in a policy that it should be void if the property was mortgaged on or after the date of the policy was valid and binding. Sulphur Mines Co. v. Phenix Ins. Co. of Brooklyn (Va.), 28 S. E. Rep. 856. Where a policy of fire insurance covering personal property was issued to a partnership, the fact that one member thereof subsequently executed and delivered to another member a mortgage on such property did not constitute such an incumbrance as was contemplated by a stipulation in the policy to the effect that it should be void "if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage" Alston v. Phenix Ins. Co., 100 Ga. 287, 27 S. E. Rep. 981. A provision in a policy against mortgages on the insured property is not violated by the giving of a mortgage, where the condition on which it was to be effective is not complied with. Weigen v. Council Bluffs Ins. Co. (Iowa), 73 N. W. Rep. 862. A policy which provides that it shall be void if the personal property insured shall become incumbered by a chattel mortgage is not avoided by a mortgage given on the real estate and personal property the day on which the property is destroyed at night, but not delivered and the money received thereon till the day after; especially in a case where the insurance company, for three months after notice of the fire, manifested an intention to waive all forfeiture. Hanscom v. Home

Ins. Co., 90 Me. 333, 38 Atl. Rep. 324. A policy covering real estate provided that it should become void if the property should be incumbered. When the policy was issued, the land was mortgaged for $2,500. Another tract belonging to insured was incumbered to the amount of $1,300. Five hundred dollars of these debts was a common charge on both tracts. After the policy was written, and before the fire, the insured took up all the mortgages, and executed in their stead a mortgage on both tracts to secure $3,500, being the old debts with accrued interest. Held, that the fact that the incumbrance on the insured property had been substantially changed and increased in amount rendered the policy void, and that the court could not speculate on the relative values of the two tracts or the probable manner of enforcement of the mortgages to ascertain if the risk had been increased. Johansen v. Home Fire Ins. Co. (Neb.), 74 N. W. Rep. 866. An insured who incumbers his personal property after it has been insured, and contrary to the provisions of the policy, may, nevertheless, recover therefor if the mortgage is discharged before the loss occurs. Johansen v. Home Fire Ins. Co. (Neb.), 74 N. W. Rep. 866. A policy providing by its terms that it shall be invalidated if the insured shall mortgage the property described therein, becomes invalid when any part of the property is mortgaged. Home Fire Ins. Co. v. Bernstein (Neb.), 75 N. W. Rep. 839. A condition rendering an insurance policy void by an increase of the hazard is not violated by giving a mortgage in order to discharge incumbrances on the property of which the insurer had knowledge when the insurance was effected. Koshland v. Fire Assn. of Philadelphia (Oreg.), 49 Pac. Rep. 865. Where a fire policy containing a clause avoiding it if the subject of the insurance be or become incumbered by mortgage is issued with knowledge of the company of an existing incumbrance, and a new incumbrance is made for the purpose of discharging the old, in an action on the policy evidence that the new incumbrance was less than the old is immaterial, since the policy is not avoided so long as it is not larger. Koshland v. Home Mut. Ins. Co. (Oreg.), 50 Pac. Rep. 567. Whether a mortgage on insured's chattels was ever delivered, so as to constitute an incumbrance, in violation of the policy, is a question for the jury, though O, the owner, signed and acknowledged the mortgage to D, and caused it to be recorded; it not appearing that D or O ever agreed that it should be given, or that D ever requested O to give it, and there being no testimony that it was ever delivered to D or any one for him, but O testifying that he never delivered it or the note it was to secure, and D that he knew nothing of it till after the fire, though O had said he would give him a mortgage on some lots, and S was to look after such a mortgage for him. Phœnix Ins. Co. v. Overman (Ind. App.), 52 N. E. Rep. 771. Where a policy provided that assured should notify the insurer of any incumbrance on the property either at the time the policy was issued or during its continuance, failure to give notice of an incumbrance existing at the time of issuance is a breach of condition avoiding the policy. Indiana Ins. Co. v. Pringle (Ind. App.), 52 N. E. Rep. 821. Insured held, under a land contract whereby he was to pay $350, a portion of a tract mortgaged for $500. His application stated that the property was incumbered for $350 00. Held to be a concealment avoiding the policy, since the land was mortgaged for $150 more than divulged. Niles v. Farmers' Mut. Fire Ins. Co. of Grand Traverse, Antrim, and Leleenau Counties (Mich.), 77 N. W. Rep. 933. A chattel mortgage which had been paid, but which was not satisfied of record when the property was insured, does not invalidate the policy, requiring the property to be free from incumbrance. Laird v. Littlefield, 53 N. Y. S. 1082, 34 App. Div. 43.

CORRESPONDENCE.

SOCIAL GAMES AT PRIVATE RESIDENCES AS GAMBLING.

Since asking the question in vol. 50, p. 23, CENTRAL LAW JOURNAL, as to whether the giving or playing for a prize offered by a social host is gambling or gaming within a city ordinance prohibiting gaming, I have found some authorities in point, in addition to those cited by H. D. Bailey, Esq., in your issue of Feb. 23. The exact point was passed upon in State v. DeBoy, 117 N. Car. 705, where it was declared that the statute against gaming does not prohibit "the social diversions in which the hostess offers prizes for the most successful player at cards or other games." It is held that a contest for a prize offered by third persons to the successful contestant, such as the offer and payment of premiums by associations for success in the competition of horses as to speed, and of oxen as to strength, and the like, is not gaming (Hawkins v. Ottinger, 115 Cal. 454; People v. Fallon, 152 N. Y. 12, 57 Am. St. Rep. 492; Edson v. Parviet, 22 Vt. 291; Ballard v. Brown, 67 Vt. 586); and the fact that each contestant pays an entrance fee for the privilege of becoming a contestant in the contest, does not make it gambling. Hawkins v. Ottinger, 115 Cal. 454; Porter v. Day, 71 Wis. 300; Jordan v. Kent (Sup. Ct.), 44 How. Pr. (N. Y.) 205; People v. Fallon, 152 N. Y. 12. It has been held, however, that it would be gaming if the stakes were contributed entirely by the contestants alone, and the successful contestant were to have the fund thus created. Diggle v. Higgs, 2 Ex. D. 422; Gibbons v. Governeur, 1 Den. (N. Y.) 170; Dudley v. Flushing Jockey Club (C. Pl. Spec. L.), 14 Misc. Rep. (N. Y.) 58. Gaming is the risking of money between two or more persons on a contest or chance of any kind, where one must be the loser and the other the gainer. Anderson's Law Dict.; Portis v. State, 27 Ark. 362.

HIGH FIVE.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ACCIDENT INSURANCE — Death from Concurrent Causes.—Under an accident policy which expressly stipulates against liability for death from accident unless the accident is the proximate and sole cause, there can be no recovery where the death of the insured resulted from a rupture of the heart caused in part by its diseased condition, and in part from a fall, neither cause in itself being sufficient to cause death.—HUBBARD V. MUTUAL ACC. ASSN., U. S. C. C., E. D. (Penn.), 98 Fed. Rep. 930.

2. ACTION—Consolidation of Causes.—A bill by a creditor to wind up an estate as insolvent, and to transfer the administration from the county court to the chancery court, having for its object the sale of the land of the estate, and the application of the fund thus arising to the payment of decedent's debts, should join the heirs as parties.—TIMMONS V. RAINEY, Tenn., 55 S. W. Rep. 21.

3. ADVERSE POSSESSION. — Where defendant purchased the improvements and claim of one in possession of agricultural college lands believing that he could acquire title to the same from the United States under the homestead act, and it did not appear that he ever changed the character of his possession on learning that he could not acquire title therefrom, or when he began to hold adversely, if at all, he was not entitled to the land against a grantee of the State under a claim of adverse possession.—HUNNEWELL V. ADAMS, Mo., 55 S. W. Rep. 95.

4. APPEAL—Action at Law.—Where an action at law was tried before the court, and no declarations of law were asked for or made, and no exceptions saved to the admission of evidence, there is nothing for an appellate court to review.—WISCHMEYER'S ADM'R. V. RICHARDSON, Mo., 55 S. W. Rep. 74.

5. APPEAL—Notice—Adverse Parties.—An assignee of an adverse party and a receiver appointed by the court to distribute funds in controversy are not necessary parties to an appeal, within Hill's Ann. Laws, § 577, requiring notice of appeal to be served on the adverse party.—MEDYNSKI V. THEISS, Oreg., 59 Pac. Rep. 871.

6. ASSAULT AND BATTERY—Injury to Wife—Damages.—In a civil action for actual damages to plaintiff's wife caused by an assault committed by defendant's agent, it was error to instruct that an assault became aggravated when committed by an adult male on the person of a female, since such statement, though true, was apt to lead the jury to assess more than actual damages.—TEXAS COAL & FUEL CO. V. ARENSTEIN, Tex., 55 S. W. Rep. 127.

7. ASSIGNMENT FOR CREDITORS—Sale of Incumbered Land.—Where a party who is insolvent makes a general assignment of his property for the benefit of all of his creditors, to a trustee, and in said deed of assignment two parcels of real estate are conveyed, upon each of which the assignor owes a balance of purchase money, secured by vendor's lien, which tracts are advertised and sold by the trustee, without mentioning the liens in the notice of sale, to a party who is a large creditor of the assignor, for an adequate price, without reference to the liens, *caveat emptor* does not apply, and such purchaser, in the circumstances, has the right to discharge such liens out of the purchase money.—LINN V. COLLINS, W. Va., 34 S. E. Rep. 916.

8. ASSIGNMENT OF ACCOUNT—Validity.—That defendant orally agreed to pay his attorney one-half of the amount of a claim, as his fees and expenses for collecting it, is insufficient to prove an assignment to the attorney of the claim, as against a judgment creditor of defendant seeking to subject the judgment obtained by defendant to the lien of the judgment, where defendant's attorney filed an attorney's lien on the judgment recovered by him, and admitted that the word "assignment" was not used in the conversation when the agreement was made.—TONE V. SHANKLAND, Iowa, 81 N. W. Rep. 789.

9. ATTACHMENT—Lien.—An attachment is a lien on personal estate from levy, though no bond be given to authorize the officer to take possession, and one purchasing of the debtor with notice of the levy takes subject to it.—BOWLBY V. DE WITT, W. Va., 34 S. E. Rep. 919.

10. BANKRUPTCY—Acts of Bankruptcy.—Where a corporation, under the provisions of a State statute, files in a State court its voluntary application for dissolution, and for the appointment of a receiver to wind up its affairs and distribute its assets on the ground of its insolvency, and procures the appointment of a receiver thereon, such application is not "a general assignment for the benefit of its creditors," within the meaning of Bankr. Act 1898, § 3a, cl. 4, providing that such an assignment shall constitute an act of bankruptcy.—IN RE EMPIRE METALLIC BEDSTEAD CO., U. S. C. C. of App., Second Circuit, 98 Fed. Rep. 981.

11. BANKRUPTCY—Arrest of Bankrupt—Form of Warrant.—Bankr. Act 1898, § 9b, authorizing the arrest of a bankrupt who is about to leave the district in order to avoid examination, does not require the warrant to state that the bankrupt is to be brought before the court for examination, and the writ will not be vacated for failure to include such a statement if it was issued upon a sworn petition setting forth the necessary facts, and the bankrupt, being forthwith brought before the judge, did not demand an examination or make any objection, but immediately offered bail, which was accepted.—IN RE LIPKE, U. S. D. C., S. D. (N. Y.), 98 Fed. Rep. 970.

12. BANKRUPTCY—Assets—Estate in Remainder.—A testator devised all his property to his wife "for and during the term of her natural life." He appointed her executrix, and gave her power to sell the property, or any part thereof, and to "invest and reinvest the proceeds." He devised to his son, "absolutely and forever, all the rest, residue and remainder" of his property after the death of his wife. After the death of the testator, but before the death of the widow, the son was adjudged bankrupt. Held, that at the time of the adjudication he had an absolute vested remainder in his father's estate, which would pass to his trustee in bankruptcy, and should have been listed in his schedule of assets.—IN RE WOOD, U. S. D. C., S. D. (N. Y.), 98 Fed. Rep. 972.

13. BANKRUPTCY — Jurisdiction. — Section 2 of the bankruptcy act of 1898 confers upon district courts full jurisdiction of actions at law and suits in equity to collect the estates of bankrupts, and this jurisdiction is in no way impaired by subdivision b of § 23.—IN RE WOODBURY, U. S. D. C., D. (N. Dak.), 98 Fed. Rep. 833.

14. BANKRUPTCY—Jurisdiction in Voluntary Cases—Appearance by Attorney.—An adjudication of bankruptcy duly entered upon the voluntary petition of a debtor personally within the jurisdiction of the court, the petition and schedules being signed and verified by the bankrupt himself in proper form, will not be set aside, on motion of a creditor, because the attorney who appeared on the petition as the bankrupt's attorney, and who represented him before the referee, had not been admitted to practice in the federal courts of the district, such an objection not affecting the jurisdiction of the court.—IN RE KINDT, U. S. D. C., S. D. (Iowa), 98 Fed. Rep. 867.

15. BANKRUPTCY—Jurisdiction—Suits by Trustee.—A court of bankruptcy has jurisdiction of a proceeding by a trustee in bankruptcy for the recovery of property of the bankrupt held by an attaching creditor whose attachment was obtained in a suit begun against the bankrupt within four months prior to the filing of the petition in bankruptcy.—IN RE HAMMOND, U. S. D. C., D. (Mass.), 98 Fed. Rep. 845.

16. BANKRUPTCY—Jurisdiction—Suits by Trustees.—A district court of the United States, as a court of bankruptcy, has jurisdiction of a bill in equity by a trustee in bankruptcy against the bankrupt and a third person, to set aside a conveyance made by the bankrupt to his co-defendant, on the ground of its being fraudulent as to creditors, although the parties are all citizens of the same State.—PEPPERDINE v. HEADLEY, U. S. D. C., W. D. (Mo.), 98 Fed. Rep. 863.

17. BANKRUPTCY — Liens upon Estate — Unrecorded Mortgage.—Under Bank. Act 1898, § 67a, providing that "claims which, for want of record or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate," a trustee in bankruptcy occupies the position of a purchaser for value, without notice; and a creditor cannot enforce against property in the hands of the trustee a chattel mortgage or other incumbrance which, for want of record and of actual notice, would not have been valid as against such a purchaser.—IN RE BOOTH'S ESTATE, U. S. D. C., D. (Oreg.), 98 Fed. Rep. 975.

18. BANKRUPTCY—Partnership.—Where a petition in voluntary bankruptcy is presented both in the name of a partnership and in the names of the individual partners, and is accompanied by schedules setting forth the debts and assets of the firm and also of the partners, and thereupon the petitioners are adjudged bankrupt as prayed, it is not necessary that each partner should also file an individual petition, in order to be relieved from his individual debts, but the court of bankruptcy may administer upon the separate estates of the partners as well as upon the estate of the firm in a single proceeding, and may grant to the partners a discharge from both separate and joint debts, and apportion the costs equitably between the individual and the joint estates.—IN RE GAY, U. S. D. C., D. (N. H.), 98 Fed. Rep. 870.

19. BANKRUPTCY — Partnership.—Under Bank. Act 1898, § 5, a partnership is a "person" or entity which may be adjudged bankrupt upon its voluntary petition, or involuntary proceedings, if it has committed an act of bankruptcy, irrespective of any adjudication of the individual partners as bankrupts; and the adjudication of the firm will subject the separate estates of the partners, as well as the firm property, to administration in bankruptcy.—IN RE MEYER, U. S. C. C. of App., Second Circuit, 98 Fed. Rep. 976.

20. BANKRUPTCY—Preference — Knowledge of Creditor.—Where a creditor settles his account with his debtor by giving him a discount for cash to the amount usual in his line of business and stipulated for in the contract, and by accepting for the balance an order on a city for money due or to become due the debtor under a contract with the city, and within four months thereafter the debtor becomes bankrupt, the transaction is not voidable by the trustee as a preference, if the creditor had no knowledge or reasonable cause to believe that the debtor was insolvent, or that a preference was intended.—IN RE EGGERT, U. S. D. C., E. D. (Wis.), 98 Fed. Rep. 843.

21. BANKRUPTCY—Preferences—Transfer of Property. —A transfer of property to a creditor by a debtor within four months prior to his adjudication as a bankrupt does not constitute a preference under the bankruptcy law, in the absence of fraud, where the transfer was made pursuant to the terms of a prior contract under which the transferee advanced the money with which the property was acquired, reserving a lien thereon, and the option, in case of default in payment, to purchase the property at a fixed price, deducting therefrom his advances.—SABIN v. CAMP, U. S. C. C., D. (Oreg.), 98 Fed. Rep. 974.

22. BANKRUPTCY — Property in Possession of Third Persons.—The power of a court of bankruptcy to order the bankrupt, under pain of punishment for contempt, to surrender to his trustee money or property constituting assets of his estate, and which he withholds from the trustee, cannot be employed to reach property which is in the hands of third persons, claiming title thereto by transfer or conveyance from the bankrupt prior to the bankruptcy proceedings, though such transfer was manifestly fraudulent, nor to force the bankrupt or his transferees to make restitution of money or property previously transferred in fraud of the act.—IN RE MAYER, U. S. D. C., E. D. (Wis.), 98 Fed. Rep. 839.

23. BANKRUPTCY — Provable Debts—Loss of Rent.—Where a bankrupt was tenant of property under a lease which gave the landlord the right to re enter and resume possession if the lessee should be "declared bankrupt or insolvent according to law," and the lessee covenanted that in case of such a termination of the lease he would "indemnify the lessor against all loss of rent or other payments which he may incur by reason of such termination during the residue of the term," and the landlord re-entered upon the bankruptcy of the tenant, held, that he could not prove a claim against the estate of the tenant in bankruptcy for the difference between the present letting value of the premises for the remainder of the term and the stipulated rent for that period, there being no breach of the covenant of indemnity until after an actual loss of rent, and then only to the extent of such loss.—IN RE ELLS, U. S. D. C., D. (Mass.), 98 Fed. Rep. 967.

24. BANKS — Insolvency — Receivers.—Where the trustees of an insolvent bank advanced a certain percentage of its debts to the receiver, and received certain real estate under an agreement that they were eventually to sell it, and "reimburse" themselves, for the sums advanced, etc., the term "reimburse" includes interest on the advancement.—WOERZ v. SCHUMACHER, N. Y., 56 N. E. Rep. 72.

25. BILLS AND NOTES — Consideration.—Where defendants had given a note for an antecedent debt of another, without any new consideration moving to them, it was without consideration.—RICHARDSON v. FIELDS, Ala., 26 South. Rep. 981.

26. BILLS AND NOTES — Contract of Indorser — Parol Evidence to Vary.—By the uniform decisions of the United States courts, the contract created by the indorsement and delivery of a negotiable note cannot be contradicted, added to, or varied by proof of a contemporaneous parol agreement; and, the question being one of general commercial law, such rule governs in all federal courts.—NORTHERN NAT. BANK v. HOOPES, U. S. C. C., E. D. (Penn.), 98 Fed. Rep. 935.

27. BILLS AND NOTES — Fraudulent Representation—Bonds.—Where defendant alleged that he was induced to sign his name on the back of a note to plaintiff on its representations that he was liable on the bond of plaintiff's treasurer, and bound to make good a defalcation, and that the bond should be held as collateral security until such liability was ascertained, which representations defendant claimed were false, because of alleged invalidity of the bond, defendant was liable as a joint maker of the note, and not as indorser.—COURT VALHALLA, No. 16, FORESTERS OF AMERICA, v. OLSON, Colo., 59 Pac. Rep. 888.

28. BOUNDARIES — Estoppel.—A private survey made at the instance of a remote owner of lands, through whom a plaintiff in ejectment claims title, does not constitute an estoppel against such plaintiff, to prevent him from claiming in accordance with his true boundaries, in favor of strangers to such title who claim adversely thereto, and who at the inception of their claims had no knowledge of such title or of the survey.—KING v. WATKINS, U. S. C. C., W. D. (Va.), 98 Fed. Rep. 913.

29. BUILDING AND LOAN ASSOCIATION — Mortgages.—Where a mortgage to a building and loan association to secure a loan required repayment in monthly installments, but provided that the mortgagor should not be required to pay such monthly payments for a period greater than 78 months from the date of the mortgage, and the mortgagor has fully performed his part of the contract, and has made the required number of payments, the association will not be permitted

to say that the contract was *ultra vires*, where it was not forbidden by statute.—INTERNATIONAL BLDG. & LOAN ASSN. v. BRATTON, Ind., 56 N. E. Rep. 105.

30. CARRIERS—Passengers—Negligent Operation of Train.—A railroad company is liable for the negligence of its servants in starting a train, after it had stopped at a station, before a passenger had been given sufficient time to get off, and suddenly stopping again, by which the passenger, who was on her way to the door, was thrown against the end of the car and injured; and where, in an action to recover for the injury, there was evidence tending to establish such facts, the court properly refused to direct a verdict for defendant.—TEXAS & P. R. CO. v. NUNN, U. S. C. C. of App., Fifth Circuit, 98 Fed. Rep. 963.

31. CARRIERS OF PASSENGERS—Ejection of Passenger from Depot.—In an action by a passenger for damages for being forcibly ejected from a depot platform by the railway company's employees, the jury should not be instructed that reasonable cause for believing that plaintiff was violating the company's rules, in soliciting for a hotel at the time of the ejection, will excuse the act of defendant, where there is evidence that unnecessary force was used in making the ejection.—ST. LOUIS, ETC. R. CO. v. OSBORN, Ark., 55 S. W. Rep. 142.

32. CHATTEL MORTGAGES — Advances to Cropper.—A contract for the cultivation of a farm on shares, in and by the terms of which the landowner reserves the title to the cropper's share of the crops raised, as security for advances made to him, is in legal effect a chattel mortgage, in so far as it operates as security for the payment of such advances, and, to be valid as against subsequent *bona fide* purchasers, must be filed in accordance with section 4129, Gen. St. 1894.—MCNEAL v. RYDER, Minn., 81 N. W. Rep. 830.

33. CONSPIRACY — Action.—In an action for damages for conspiracy and fraud in inducing plaintiff to exchange his land for a stock of goods, refusal to instruct that conspiracy could not be made the subject of a civil action unless something was done which, without the conspiracy, would give a right of action, and that, if the jury found that the price paid by defendant to plaintiff was practically equal to the value of the property received from him, and no fraud was practiced, the verdict should be for the defendant, was error, where there was evidence on which the instruction could be predicated.—DE WULF v. DIS, Iowa, 81 N. W. Rep. 779.

34. CONTRACT—Building Contract — Pleading.—Provision in a building contract that 20 per cent. of the contract price shall not be payable till all the mechanics and material-men "shall have, in writing, acknowledged that they have been fully paid by the contractors for their work and materials," is for the benefit, not of the subcontractors, but the owner, though the contract contains an express waiver of right to file liens.—GETTY v. PENN. INS. FOR INSTRUCTION OF THE BLIND, Penn., 45 Atl. Rep. 333.

35. CONTRACT—Consideration.—Withholding competition, when not contrary to public policy, is a sufficient binding consideration for a contract.—CAMDEN v. DEWING, W. Va., 34 S. E. Rep. 911.

36. CONTRACT—Mutuality.—A promise lacking mutuality at its inception becomes binding upon the promisor after the performance by the promisee.—BOYD v. BROWN, W. Va., 34 S. E. Rep. 907.

37. COPYRIGHT — Action for Infringement.—In an action to recover the statutory penalty for infringement of a copyright, an allegation that plaintiff is the author, designer, and proprietor of a copyrighted photograph, which was copied by defendant, is not sustained by proof that plaintiff caused an alteration to be made by etching in a negative from which photographs had previously been printed and sold, and had thus become public property, and then caused the picture printed from the altered negative to be copyrighted. If the altered picture was subject to copyright, it was rendered so solely by the change made therein, which was not the product of photography, but of the etching, which is a different art.—SNOW v. LAIRD, U. S. C. C. of App., Seventh Circuit, 98 Fed. Rep. 813.

38. CORPORATIONS—Existence—Estoppel.—A corporation admitted to have been a legal corporation at one time cannot deny its corporate existence in order to escape liability on a contract of insurance entered into by it when in the apparent exercise of its corporate franchises and powers, and where it thereafter from time to time reaffirmed its existence and powers by accepting premiums on the policy.—BRADY v. DEL. MUT. LIFE INS. CO., Del., 45 Atl. Rep. 345.

39. CORPORATIONS — Insolvent Corporations — Loan From Directors.—Where directors of a corporation made a loan, to tide over its embarrassments, in the honest belief that it was solvent, their contract made with the corporation to take security therefor, in good faith, is not void.—CONVERSE v. SHARPE, N. Y., 56 N. E. Rep. 69.

40. CORPORATIONS — Magnetic Telegraph — Telephones.—Rev. St. arts. 698, 699, providing that "corporations created for the purpose of constructing and maintaining magnetic telegraph lines" may set their poles, etc., upon public roads, and authorizing proceedings to condemn lands for the use of such corporations, apply to like proceedings by telephone companies organized under Rev. St. art. 642, subd. 8, authorizing corporations for the construction of "a telegraph and telephone line."—SAN ANTONIO & A. P. RY. CO. v. SOUTHWESTERN TELEGRAPH & TELEPHONE CO., Tex. 55 S. W. Rep. 117.

41. CORPORATIONS — Peddling Without License. — A corporation may be punished for peddling without license, on account of sales made by its unlicensed agent, though a peddler's license cannot issue to a corporation except in the name of a designated agent, who alone can sell thereunder.—STANDARD OIL CO. v. COMMONWEALTH, Ky., 55 S. W. Rep. 8.

42. COVENANT OF WARRANTY—Defense of Title.—In an action to recover for breach of covenants of warranty, where plaintiff had given in part payment the notes of a third person, and he received back such notes from defendant pending trial, and it was in dispute whether he had obtained them with intent to retain them to save himself from loss thereon, or whether he intended merely to use them as evidence on a former trial, he could be asked why he had not notified defendant, who was a witness at the former trial, to produce them, if he had not intended to retain them himself.—ALEXANDER v. STALEY, Iowa, 81 N. W. Rep. 803.

43. CRIMINAL EVIDENCE—Adultery — Declarations of Paramour.—In a prosecution for adultery, declarations of defendant's paramour and her daughter to witnesses, made in defendant's absence, that such paramour was a married woman, and that her husband was living and resided at a certain place, were inadmissible to prove such fact as against defendant.—WHICKER v. STATE, Tex., 55 S. W. Rep. 47.

44. CRIMINAL EVIDENCE — Declarations. — The testimony of a third person as to what the wife of the accused said some time before the occurrence is not admissible, and its rejection by the court affords no ground to reverse the verdict.—STATE v. BUFORD, La., 26 South. Rep. 991.

45. CRIMINAL EVIDENCE — Larceny.— An indictment charging an unlawful taking of one $10 bill, of the lawful currency of the United States of America, and of the value of $10, from the person of another, sufficiently describes the property alleged to have been stolen.—SPENCER v. STATE, Tex., 55 S. W. Rep. 58.

46. CRIMINAL LAW—Appeal—New Trial.—A motion for new trial, filed more than four days after the return of a verdict of guilty, is a nullity, under Rev. St. 1889, § 4270, requiring such motions to be filed within four days after the verdict.—STATE v. MADDOX, Mo., 55 S. W. Rep. 72.

47. CRIMINAL LAW—Assault—Instructions.—Where, in a prosecution for assault, the court charged that if ac-

cused inflicted the injury in his own necessary self-defense against the assault of the prosecutor, and did not use greater force than was necessary to prevent such assault, then defendant was not guilty, and he was not bound to retreat, but might act on a reasonable apprehension of danger, viewed from his standpoint, but that self-defense was a defensive, and not an offensive, act, it was substantially correct.—TURNER v. STATE, Tex., 55 S. W. Rep. 53.

48. CRIMINAL LAW—Disqualification of Juror.—Where a juror, upon his *voir dire*, denies having formed or expressed any opinion as to the guilt of the accused, and is accepted as a juror, and the accused is convicted, and it is thereafter made to appear, upon the trial of a motion for new trial, that such juror had expressed a decided opinion adverse to the accused, and had persisted in it, and it is further shown that neither the accused nor his counsel knew of such expression of opinion prior to the conviction, a new trial should be granted.—STATE v. GIRON, La., 26 South. Rep. 985.

49. CRIMINAL LAW—Reprieve—Authority of Governor to Grant.—The power to reprieve in all cases of felony is vested in the governor of this State, by the constitution thereof, where the necessity therefor exists. He is the sole judge of such necessity, and his conclusions are not reviewable by the courts, but are binding on the other departments of the government.—STATE v. HAWK, W. Va., 34 S. E. Rep. 918.

50. CRIMINAL LAW—Seduction—Unmarried Female.—In prosecution for seduction, under Rev. St. 1889, § 3486, requiring that the female seduced be unmarried, a letter from defendant to prosecutrix, promising to marry her "if I ever get to be a man of myself, and you are still single," together with an admission by defendant on the witness stand that he intended to marry prosecutrix up to a certain time, was sufficient to justify a finding that she was unmarried when seduced.—STATE v. REED, Mo., 55 S. W. Rep. 74.

51. CRIMINAL LAW — Severance.—Where several persons are jointly indicted for an offense which might have been committed by several, the question of severance is a matter within the discretion of the trial judge, which will not be interfered with by this court.—STATE v. CATELY, La., 26 South. Rep. 1004.

52. DAMAGES—Illegal Levy — Exemplary Damages.—Exemplary damages cannot be recovered of a constable for the seizure and sale of the wife's household goods under an attachment against the husband, where it appears that the goods were believed to belong to the husband, and that there was nothing wanton or malicious in the conduct of the constable or of the attachment plaintiff, nor any unnecessary humiliation inflicted upon the wife, nor any force used.—BROWN v. ALLEN, Ark., 55 S. W. Rep. 143.

53. DAMAGES — Injury to Business—Punitive Damages.—Defendants, having given notice to plaintiff and some of his customers that he was infringing their patent, and threatened suit if he continued to make, or his customers to buy, such goods, and this being false, the patent having expired, they are liable for punitive damages, if, in addition to legal malice, the absence of reasonable ground to believe the notice when issued, there was an actual malicious intent to injure.—STROUD v. SMITH, Penn., 45 Atl. Rep. 329.

54. DAMAGES—Railroads—Mental Shock.—Where the disease and injuries of which plaintiff complains resulted from a severe mental shock which he received in a railway collision caused by defendant's negligence, he is entitled to recover damages, though he received no bodily injury at the time.—GULF, ETC. R. CO. v. HAYTER, Tex., 55 S. W. Rep. 128.

55. DEATH BY WRONGFUL ACT — Action by Next of Kin.—In an action by a father to recover for the wrongful death of his son, who left no widow and children, the father being the sole next of kin, under Code Civ. Proc. § 1870, and section 2732, subd. 7, and as such entitled to the entire amount of recovery, under *Id.* § 1903, providing that the damages recovered shall be exclusively for the benefit of such next of kin, it was error to admit evidence as to the poverty of the brothers and sisters and other relatives of deceased, who are not next of kin.—LIPP v. OTIS BROS. & CO., N. Y., 56 N. E. Rep. 79.

56. DEEDS — Delivery — Acceptance.—Deceased executed several deeds, and gave them to a notary, to be delivered by him to one of the beneficiaries, who was expected to call for them. Subsequently, upon ascertaining that the deeds had not been called for, deceased procured them from the notary and delivered them himself. Held, that the delivery was complete when the deeds were given to the notary, and, on their acceptance by the grantees, took effect from the date of such delivery.—CLARK v. CLARK, Ill., 56 N. E. Rep. 82.

57. DEED — Reformation — Parties.—Land was purchased by a husband, with the understanding that the title was to be vested in him and his wife jointly. The wife procured a deed from the vendor, to her sole and separate use, without the knowledge or consent of the husband, and kept this fact concealed from him until after his death. Held, in an action by the husband against the wife's heirs for a reformation of the deed, that the vendor was not a necessary party, since he made no claim to the land.—OWEN v. WILLIAMS, Tenn., 55 S. W. Rep. 18.

58. DIVORCE—Adultery—Condonation.—Proof by the wife of her husband's forgiveness in words, his promise to receive her back to his home, and the conveyance of property to her while the question of her return was pending, for the purpose of showing his good faith, were not sufficient to show condonation of adultery, where not followed by acts actually reinstating her as wife.—GEOGER v. GEOGER, N. J., 45 Atl. Rep. 349.

59. EASEMENT—Way of Necessity—Natural Gas.—If a landowner conveys a right of way through his farm in fee to a railroad company, and years afterwards natural gas is found on his lands situated on the further side of such right of way from his residence, the law will imply a way of necessity by which he may pipe such gas to his residence for use therein; the pipes to be so laid and constructed as not to interfere in any way with such railroad company's proper use and occupation of its right of way.—UHL v. OHIO RIVER R. CO., W. Va., 34 S. E. Rep. 934.

60. EMINENT DOMAIN — Condemnation Proceedings—Compensation.—The fundamental doctrine that private property cannot be taken for public use without just compensation does not require that the compensation be made in all cases concurrently in point of time with the actual exercise of the right of eminent domain, but, at whatever time it is to be made under the statute, just compensation entitles the owner to the full market value of his property at the time of the taking, and that time is to be determined by the terms of the particular statute under which the proceedings are had.—BENEDICT v. CITY OF NEW YORK, U. S. C. C. of App., Second Circuit, 98 Fed. Rep. 789.

61. EQUITY — Laches.—One who would set aside a decree by reason of mistake must proceed within a reasonable time after knowledge of it, else he will be barred of relief, by laches.—SEYMOUR v. ALKIRE, W. Va., 34 S. E. Rep. 953.

62. EXPERT TESTIMONY — Instructions.—An instruction that the jury are not bound by the opinions of expert witnesses, but that they have a right to disregard all or any part of such opinions as appear to them unreasonable, is correct; it not being necessary to tell them that, to disregard the opinions, they must do so solely on some other fact or circumstance in the case, drawn out by the testimony.—HOYBERG v. HENSKE, Mo., 55 S. W. Rep. 83.

63. FEDERAL COURTS—Circuit Court of Appeals—Jurisdiction.—A suit brought to have ordinances granting a franchise to construct and operate a street railroad annulled on the ground that they impair the obligation of a contract made by an act of the legislature and a prior ordinance, by which plaintiff claims to

have been granted an exclusive franchise, and deprive plaintiff of property without due process of law, necessarily involves a constitutional question, and the circuit court of appeals is without jurisdiction of an appeal therein.—J. C. HUBINGER CO. v. QUINCY HORSE-RAILWAY & CARRYING CO., U. S. C. C. of App., Seventh Circuit, 98 Fed. Rep. 897.

64. FEDERAL COURTS — Equity Jurisdiction.—A legal remedy, to defeat jurisdiction of a federal court in equity, must be one existing when the judiciary act of 1789 was adopted, or thereafter created by act of congress.—GREEN v. TURNER, U. S. C. C., N. D. (Iowa), 98 Fed. Rep. 756.

65. FEDERAL COURTS — Jurisdiction.—To constitute an adequate remedy at law, which will deprive a federal court of equity of jurisdiction of a suit between citizens of different States, such remedy must be one enforceable in the same court by an action which may be brought by the complainant. A remedy existing only in a State court is not sufficient; nor is the right to plead the matters alleged in the bill in defense to an action brought by the defendant, and which is under the defendant's control.—UNITED STATES LIFE INS. CO. IN CITY OF NEW YORK v. CABLE, U. S. C. C. of App., Seventh Circuit, 98 Fed. Rep. 761.

66. FEDERAL COURTS—Jurisdiction—Suit on Forthcoming Bond.—The Illinois statute giving a plaintiff in attachment the right to bring an action on a forthcoming bond taken by the sheriff, "the same as if such bond had been assigned to him," does not render him, in fact or constructively, an assignee, within the meaning of the federal judiciary act, so as to preclude a circuit court of the United States from taking cognizance of such action, where the plaintiff is a citizen of another State, although the sheriff could not have sued therein.—SMITH v. PACKARD, U. S. C. C. of App., Seventh Circuit, 98 Fed. Rep. 793.

67. FEDERAL COURTS—Jurisdiction—Suit to Foreclose Lien.—Under section 8 of the federal judiciary act of 1875, continued in force by the acts of 1887 and 1888, a federal court is given jurisdiction of a suit to foreclose a mortgage on real estate within the district, although the defendant is not an inhabitant of the district, nor found therein, where personal service is made upon him in another district.—MERRIHEW v. FORT, U. S. C. C., N. D. (Ga.), 98 Fed. Rep. 899.

68. FRAUDULENT CONVEYANCES—Husband and Wife—Indebtedness.—Money due by a husband to his wife on account of a collection by him of a debt due him as her trustee will support a conveyance of his property to her, as against his creditors, to the amount of such debt, though she was present at the time of such collection to join in a release of the trust deed securing the debt.—MCCONVILLE v. NAT. VALLEY BANK OF STAUNTON, Va., 34 S. E. Rep. 891.

69. FRAUDULENT CONVEYANCES — Parties.— Admissions and declarations of the wife are improperly admitted against the husband in an action against them by her creditors to set aside a conveyance by her to him as fraudulent; such evidence being forbidden by Code, § 4606; Acts 27th Gen. Assem. ch. 108, being passed after the trial, and not being retroactive.—CEDAR RAPIDS NAT. BANK v. LAVERY, Iowa, 81 N. W. Rep. 775.

70. FRAUDULENT CONVEYANCES — Ratification of Grantees.—A finding that certain creditors of an insolvent firm participated in the fraud of the firm in making transfers to them in fraud of creditors will not be reversed on the ground that the favored creditors did not participate in the fraud, where they accepted the advantages given them, without taking any independent action toward collecting their claims themselves.—METCALF v. MOSES, N. Y., 56 N. E. Rep. 67.

71. GARNISHMENT—Jurisdiction—When Accounting is Required.—A federal court is not without jurisdiction at law to render judgment against a garnishee on the ground that an accounting between the garnishee and the debtor is involved, which can only be had in a court of equity, where the only question to be determined is the amount due from the garnishee to the debtor under a contract by which they were to share the net profits of a business transaction which has been fully closed, and it does not appear that such determination involves an accounting of the complicated nature which is essential to give a court of equity jurisdiction, but it merely requires a finding of the amounts advanced and the expenses paid by the garnishee under the contract, all of which are shown by his undisputed evidence.—RANDOLPH v. TANDY, U. S. C. C. of App., Fifth Circuit, 98 Fed. Rep. 939.

72. GARNISHMENT—Writ—Return.—A return on a writ of garnishment, signed in the name of a constable by his deputy, was proper, where the appointment of a deputy to execute the writ was authorized.—STEPHENS v. COX, Ala., 26 South. Rep. 981.

73. GIFTS — Sufficiency of Delivery.—A gift of bonds by a husband to his wife is not established by evidence that the bonds were deposited by the husband in a box in a safety-deposit vault, to which the husband and wife each held a key, where they remained until the husband's death; that the wife went with her husband at various times, and assisted him in cutting coupons from the bonds; and that the husband had declared in the presence of third persons his intention to give the bonds to his wife. Such facts do not constitute a completed gift, under the rule that there must have been such a delivery as to devest the donor of dominion and control of the property.—CHAMBERS v. MCCREERY, U. S. C. C., D. (W. Va.), 98 Fed. Rep. 783.

74. HOMESTEAD—Conveyance — Jointure.—Where a husband and wife occupied and used land as a part of their homestead, and such occupancy continued openly and adversely for 10 years or more without interruption, such land became a part of the homestead, and could not be disposed of by the husband without the consent and joinder of the wife.—HENNESSY v. SAV. & LOAN CO., Tex., 55 S. W. Rep. 124.

75. INJUNCTION — Practice — Damages.—In a case where a perpetual injunction is prayed for, and also damages, the court must try the issue raised as to the injunction, and, on demand of either party, submit the question of damages to a jury, and thereafter enter the proper judgment.—STOCKER v. KIRTLEY, Idaho, 59 Pac. Rep. 891.

76. INJUNCTION—Scope—Persons not Parties.—A person cannot be committed for contempt for the violation of a restraining order made by a federal court in a suit between private persons, to which he was not made a party, either by words of specific or general description, and where he is, moreover, a citizen and resident of another State, who could not be sued by the complainant in such court without his consent.—IN RE REESE, U. S. C. C., D. (Kan.), 98 Fed. Rep. 984.

77. INSURANCE — Transfer of Insured Property.—An owner of insured property conveyed the same to her brother, to avoid the expense of probate, and died a few days thereafter. Before her death the agent of the insurance company was notified of the deed. Shortly after her death the property was destroyed by fire. The policy contained the usual provisions avoiding the insurance on change of title. Held that, as there was no title in insured or her estate at the time of the loss, the notice could in no way avail in recovering the insurance by the estate.—GILLON v. NORTHERN ASSUR. CO. OF LONDON & ABERDEEN, Cal., 59 Pac. Rep. 901.

78. JUDGMENT—Lien—Fraudulent Conveyances.—Under Sand. & H. Dig. § 4204, making a judgment a lien on defendant's real estate, and section 3049, providing that all real estate whereof "defendant, or any person for his use, was seized in law or equity on the day of the rendition of a judgment," shall be liable to sale on execution, a judgment is not a lien on lands fraudulently conveyed by the debtor prior to its rendition.—DOSTER v. MANISTEE NAT. BANK, Ark., 55 S. W. Rep. 187.

79. LANDLORD AND TENANT — Gas Lease.—Defendant contracted to pay plaintiff on the 1st of September an annual rental of $100 from the date of the drilling of a gas well on plaintiff's premises, until the well was no

longer profitable. The well was drilled November 1, 1893, and the rent for the succeeding two years was paid; but the well was abandoned as unprofitable September 1, 1896. Held, that plaintiff was entitled to recover a ratable part of the annual rent for the year in which the well was abandoned, but could not recover rent after such abandonment.—MOON v. PITTSBURGH PLATE GLASS CO., Ind., 56 N. E. Rep. 108.

80. LANDLORD AND TENANT—Lien for Supplies—Innocent Purchaser.—Under Sand. & H. Dig. § 4795, giving a landlord a lien upon crops raised on the demised premises for supplies advanced to the tenant, the landlord's lien is not good, as against a purchaser of the crop from the tenant in good faith, and without notice of the landlord's claim.—HUNTER v. MATTHEWS, Ark., 55 S. W. Rep. 144.

81. LANDLORD AND TENANT—Oil Lease.—An executory oil and gas lease, which does not bind the lessees to carry out its covenants, but reserves to them the right to defeat the same at any time, and relieve themselves from the payment of any consideration therefor, is invalid to create any estate other than the mere optional right of entry, which is subject to termination at the will of either party.—TREES v. ECLIPSE OIL CO., W. Va., 34 S. E. Rep. 933.

82. LIBEL — Other Publications.—Evidence of previous publications by others of other or the same libelous matters charged by defendant is not admissible in reduction or mitigation of damages.—SUN PRINT. & PUB. ASSN. v. SCHENCK, U. S. C. C. of App., Second Circuit, 98 Fed. Rep. 925.

83. LIFE INSURANCE — Application—False Statement.—Where a life insurance policy based on the application of the assured stipulated that, if any of its statements proved untrue, the policy should be void, the false statements that the applicant's present health was good, and that he had had no occasion to consult a physician, will avoid the policy.—NELSON v. NEDERLAND LIFE INS. CO., Iowa, 81 N. W. Rep. 807.

84. LIFE INSURANCE — Beneficiary — Vested Right.—Where a husband took out a life insurance policy payable to his wife, Code 1892, § 1964 (Code 1880, § 1261), providing that the proceeds of a life insurance policy shall inure to the party named as beneficiary, vests an indefeasible interest therein in the wife, and a pledge of it for a debt by the husband without the wife's consent is invalid.—JACKSON BANK v. WILLIAMS, Miss., 26 South. Rep. 965.

85. LIMITATION OF ACTIONS — Married Women.—Under Act Jan. 4, 1851 (Sand. & H. Dig. § 4815), limiting the time for bringing actions for the recovery of lands to seven years, but giving married women the right to bring them within three years after discoverture, the suit of a married woman, brought before discoverture to recover possession of property which defendant claimed adversely for more than seven years during such coverture, is not barred by limitation.—ROWLAND v. MCGUIRE, Ark., 55 S. W. Rep. 16.

86. MANDAMUS—Other Adequate Remedy.—*Mandamus* can only be resorted to where there is no other adequate remedy to accomplish the purpose sought thereby; and where a remedy by appeal or writ of error exists, and such remedy is competent to afford full and ample relief, *mandamus* will not lie.—STATE v. CALL, Fla., 26 South. Rep. 1016.

87. MARRIED WOMAN—Disabilities—Contract.—Under Hill's Ann. Laws, §§ 2992, 2997, 2998, empowering a wife to manage and convey her property to the same extent that her husband can his property, and providing that she may contract and incur liabilities, which may be enforced by or against her as if she were a *feme sole*, and repealing all laws recognizing civil disabilities as to her which are not recognized as to her husband, "except the right to vote," etc., where a wife joins her husband in a mortgage on his property to secure his debt, and the mortgage contains a covenant on the part of both that they will pay the debt, she is bound thereby, and a personal decree may be entered against her, enforceable out of her separate property.—FIRST NAT. BANK OF SOUTHERN OREGON v. LEONARD, Oreg., 59 Pac. Rep. 878.

88. MASTER AND SERVANT—Fellow-Servants—Railroad Engineers and Firemen.—Plaintiff, who was employed as a fireman on an engine of defendant railway company, while oiling a turntable by direction of the engineer, which was a matter properly within the duty of the engineer to have attended to, under the circumstances and the rules of the company, was injured through the negligent act of the engineer. Held that, under the common law rule as declared by the courts of the United States, the engineer was a fellow-servant with plaintiff, for whose negligence the master was not liable.—BRIEGAL v. SOUTHERN PAC. CO., U. S. C. C. of App., Fifth Circuit, 98 Fed. Rep. 958.

89. MASTER AND SERVANT — Negligence—Pleadings.—A complaint charging that defendant negligently constructed a side track, and ordered deceased, an engineer, to run his engine over it, and that the decedent, without fault on his part, was killed by the overturning of the engine as a result of the giving way of the side track, is demurrable for want of an allegation that decedent had no notice of the condition of the side track.—CLEVELAND, ETC. R. CO. v. PARKER, Ind., 56 N. E. Rep. 86.

90. MISJOINDER OF PARTIES—Anti-Trust Law—Unlawful Combination.—A complaint alleging that members of an association have conspired and combined to raise the prices of tiles, mantels, and grates, to control the output, and to regulate the prices thereof, with the intent to monopolize the trade and commerce between the other States and California in regard thereto, as well as to arbitrarily fix their prices independently of their natural market value, brings the case within the anti trust act of July 2, 1890 (26 Stat. 209).—LOWRY v. TILE, MANTEL & GRATE ASSN. OF CALIFORNIA, U. S. C. C., N. D. (Cal.), 98 Fed. Rep. 817.

91. MORTGAGE — Deeds of Trust — Sale by Trustees.—Defendant purchased land from deceased's estate, and gave the executors a deed of trust to secure the purchase price. Afterwards certain timber on the land was sold by the defendant, the executors' consent to the sale being obtained on condition that the proceeds be applied on defendant's debt to deceased's estate. Held, in the absence of a specific agreement to the contrary, that the executors could apply the money received by them from the sale on indebtedness of defendant to deceased's estate other than that secured by the deed of trust, as against one acquiring a second lien after the sale of the timber.—CONEY v. LAIRD, Mo., 55 S. W. Rep. 96.

92. MORTGAGE—Foreclosure—Estoppel.—It is error to decree a joint sale of distinct parcels of property mortgaged to secure several different debts, by different mortgages, for the satisfaction of the aggregate amount of all of the mortgage debts.—STRODE v. MILLER, Idaho, 59 Pac. Rep. 893.

93. MUNICIPAL CORPORATIONS — Duty to Maintain Safeguards Above Dam.—A city in which is vested title to a park through which flows a river, made a slackwater navigation by a corporation authorized by statute, with power to erect dams and locks, has no duty, in the absence of statutory requirement, to maintain safeguards above a dam erected by such corporation within the park limits, to prevent boats drifting over the dam.—EWEN v. CITY OF PHILADELPHIA, Penn., 45 Atl. Rep. 339.

94. MUNICIPAL CORPORATIONS—Health Department.—Gen. St. §§ 3312, 3313, authorizing municipalities to enact ordinances necessary for the safety, health, and comfort of their inhabitants, give a city ample power to create by ordinance the office of city scavenger, and to provide that no other person shall do scavenger work without a license.—CITY OF OURAY v. CORSON, Colo., 59 Pac. Rep. 876.

95. MUNICIPAL CORPORATIONS—Interest-Bearing Warrants.—The Illinois statute of May 31, 1879 (Hurd's Rev·

St. ch. 146a, §§ 1, 2), providing that warrants "payable on demand" shall be issued upon the treasurer of the State or any county or municipality only when there shall be sufficient money in the appropriate fund to pay the same, except that, when there shall be no money to meet the ordinary and necessary expenses, warrants may be authorized and issued in anticipation of taxes levied, does not affect the power of a county, existing under prior statutes, and recognized by the decision of the supreme court of the State, to issue interest-bearing orders, payable at specified times in the future, in payment of contractors for the building of a jail; nor are such orders rendered invalid because they are negotiated by the county, and the proceeds used to pay the contractors.—FRANKFORD REAL ESTATE, TRUST & SAFE-DEPOSIT CO. v. JACKSON CO., U. S. C. C. of App., Seventh Circuit, 98 Fed. Rep. 942.

96. MUNICIPAL CORPORATION—Sidewalks—Bicycling.—A city is not liable to a person for injuries resulting from being struck by a bicycle ridden on the sidewalk, or for the failure to pass an ordinance prohibiting such use of its sidewalks.—JONES v. CITY OF WILLIAMSBURG, Va., 34 S. E. Rep. 883.

97. MUNICIPAL CORPORATIONS — Streets—Vacation.—A petition by the owner of property abutting on a city street to enjoin the city and a private corporation from vacating a street and building on a portion thereof, not showing that the petitioner's property abutted on such portion intended to be vacated, nor stating facts from which such inference must necessarily be drawn, states no ground for equitable relief, since, to entitle the petitioner thereto, he must show that he will suffer greater incommodity than other property owners abutting on such street.—KNAPP, STOUT & CO. COMPANY v. CITY OF ST. LOUIS, Mo., 55 S. W. Rep. 104.

98. MUNICIPAL CORPORATIONS — Vacation of Street—Damages.—While the interruption of public travel along a street by the vacation of a portion of it is a common injury, for which an individual cannot recover, the owner of property fronting on the street may recover damages for the special inconvenience in the use and enjoyment of his property, caused by his being deprived of the previous means of access thereto, the amount of such damages to be determined by the jury from a consideration of the situation, character, and probable uses of the property.—CITY OF CHICAGO v. BAKER, U. S. C. C. of App., Seventh Circuit, 98 Fed. Rep. 880.

99. NATIONAL BANK — Contract.—An agreement by a national bank to pay taxes on its stock transferred to it, and assessed at the time against the sellers, in consideration of being allowed to retain unpaid dividends and surplus, is not illegal, although the taxes are not properly assessed.—LULL v. ANAMOSA NAT. BANK, Iowa, 81 N. W. Rep. 784.

100. NEGLIGENCE — Proximate Cause.—Whether negligence of defendant's flagman in giving, without cause, a signal to the engineer of a long train of empty cars to stop, in acting on which signal, as it was the duty of the engineer to do, the cars were piled up and thrown onto the adjoining track, into which pile the train on which plaintiff's testate was engineer (belonging to, and operated, like the other train, by, another than defendant), then coming along, ran, occasioning his death, was the proximate cause of the accident, is a question for the jury.—THOMAS v. CENT. R. CO. OF NEW JERSEY, Penn., 45 Atl. Rep. 344.

101. OFFICE AND OFFICERS — School Trustees — Term of Office.—Under Const. art. 16, § 30, providing that the duration of offices not fixed by the constitution shall not exceed two years, trustees of independent school districts, authorized to exercise exclusive control over the management of free schools within their districts, and to hold title to the school property, are public officers, though they receive no salary or compensation.—KIMBROUGH v. BARNETT, Tex., 55 S. W. Rep. 120.

102. PARTNERSHIP—Dissolution — Accounting — Surviving Partner.—A bill for an accounting cannot be maintained by the widow and heirs of a deceased partner against his administrator and the surviving partner, when it fails to show collusion between them, or insolvency, or refusal by the administrator to compel a settlement, or something in their relations which prevents him from obtaining a settlement.—CONRAD'S ADMR. v. FULLER, Va., 34 S. E. Rep. 893.

103. PLEADINGS — Demurrer.—Under Rev. St. 1881, § 339 (Burns' Rev. St. 1894, § 342; Horner's Rev. St. 1897, § 339),—authorizing demurrers to a complaint for want of plaintiff's capacity to sue, or for want of sufficient facts,—where plaintiff's want of capacity to sue affirmatively appears, the defect is waived by demurring for want of sufficient facts.—ÆTNA LIFE INS. CO. v. SELLERS, Ind., 56 N. E. Rep. 97.

104. PLEADING — Set-Off.—A plea of set-off must describe the debt intended to be set off with the same certainty as in a declaration for the like demand.—GONZALES v. DE FUNIAK HAVANA TOBACCO CO., Fla., 26 South. Rep. 1012.

105. PLEADING — Set-Off and Counterclaim.—Under Sayles' Civ. St. 1897, arts. 751, 1266, providing that unless all pleas of counterclaim and set-off be plainly and particularly described, so as to give the opposite party full notice of the character thereof, they cannot be proven, a garnishee cannot prove a claim for damages for delay as a set-off or counterclaim against defendant, without particularly pleading each and every delay, and its effect constituting such damages.—SCOTT v. TEXAS CONST. CO., Tex., 55 S. W. Rep. 37.

106. PRINCIPAL AND AGENT—Bills and Notes.—In a suit on a note given for the price of land, a bill alleging that the sale was made by plaintiff's transferror to the maker of the note, who was an agent, and that the conveyance was taken in the name of the agent, and his note given in payment, was insufficient to authorize a personal judgment against his principals, since the facts alleged showed a sale on the agent's personal credit only.—MERRELL v. WITHERBY, Ala., 26 South. Rep. 974.

107. RAILROAD COMPANY—Foreclosure of Mortgage.—The allowance made by a court to trustees in a railroad mortgage for their services in relation to its foreclosure will be proportioned to the amount of service actually required and rendered; and where they do not take possession of the property, and no duties are required of them in its administration or in the distribution of the proceeds, and no contest is made to their recovery, their services being confined to the employment of counsel, a comparatively small allowance will be made them, although they realize the full amount of the mortgage debt.—PHINIZY v. AUGUSTA, ETC. R. CO., U. S. C. C., D. (S. Car.), 98 Fed. Rep. 776.

108. RAILROAD COMPANY — Negligence — Proximate Cause.—After plaintiff had passed the safety gates of a railroad crossing, and before he reached the track, a train came along, the gates were closed behind him, and he stopped close to the track. On his disregarding the call of the gateman to get back, the latter sought by force to compel him to get back; and he, resisting, was, in the tussle, thrown, and had his leg cut off by the train. Held, that the proximate cause of the injury was his resistance, so that the company was not liable.—MCANALLY v. PENN. R. CO., Penn., 45 Atl. Rep. 326.

109. RAILROAD COMPANY — Street Railroads — Negligence.—Where plaintiff, a brakeman on a railroad crossed by an electric street railway, knew that the trolley wire sagged so low that it was necessary to stoop in order to pass under it with safety while on the top of the car, his ignorance of the danger attending contact with an electric wire in no way excused his fault in failing to exercise that reasonable care which would have enabled him to pass beneath the wire with safety.—DANVILLE STREET-CAR CO. v. WATKINS, Va., 34 S. E. Rep. 884.

110. RAILROAD COMPANY—Street Railroads—Rights of Abutting Property Owners.—An abutting property

owner, who would suffer a special and irreparable injury from the construction and operation of a street railroad upon the street under an ordinance alleged to be invalid, may invoke equitable relief by injunction. The rule declared by the Supreme Court of Illinois that a court of equity will not enjoin the construction of a railroad upon a street at the suit of a private property owner, upon an allegation that the ordinance authorizing its construction is illegal, is placed upon the ground that for any injury to the plaintiff's property he has an adequate remedy at law, and cannot be applied to a case where irreparable injury is shown, which would be to deny to the complainant any adequate remedy.—GENERAL ELEC. RY. CO. v. CHICAGO, ETC. RY. CO., U. S. C. C. of App., Seventh Circuit, 98 Fed. Rep. 907.

111. REMOVAL OF CAUSES—Diversity of Citizenship.—A plaintiff in a suit in a State court for the partition of real estate, who is a citizen of a different State from the defendants, where the bill does not disclose any controversy between the parties as to their respective interests in the property, cannot prevent a removal of the cause to a federal court by defendants by joining as plaintiffs with himself infant owners of an interest in the property, who are citizens of the same State as defendants, for whom he assumes to sue as next friend, but without showing any authority therefor. In such case the federal court, for the purposes of a motion to remand, will rearrange the parties by transposing the infants to the side of the defendants, where they properly belong, and will appoint a guardian *ad litem* to protect their interests.—JARVIS v. CROZIER, U. S. C. C., D. (W. Va.), 98 Fed. Rep. 753.

112. REMOVAL OF CAUSES — Petition.—A petition for the removal of a cause to a federal court on the ground of diverse citizenship, alleging diverse "residence" of the parties "at the time of the filing of the complaint," instead of alleging diverse citizenship at the time of the commencement of the action, and also when the petition was filed, is insufficient where the citizenship is not shown by the pleadings.—GREEN v. HEASTON, Ind., 56 N. E. Rep. 87.

113. RES JUDICATA—Contract of Employment — Successive Actions.—Where, in an action to recover salary for a part of an unexpired term of plaintiff's employment, it was claimed that the employment was from month to month, and not for a year, which contention was determined in plaintiff's favor, such determination was *res judicata* of such question; and defendant could not, in a subsequent action for damages accruing subsequent to the first action, recontest such issue.—WILLIAMS v. LUCKETT, Miss., 26 South. Rep. 967.

114. SALES—Contracts—Evidence.—Where defendants pleaded as a counterclaim special damages caused by delay in delivery of certain machinery, and procuring missing and defective parts thereof, and averred notice to the sellers of the purposes for which the goods were intended, and the probable consequences of delay, they may recover such damages as may be shown to have proximately resulted from such causes, if chargeable to the sellers.—SAUNDERS' EXRS. v. WEEKES, Tex., 55 S. W. Rep. 83.

115. SALE—Refusal to Accept—Resale.—Where a buyer refuses to accept goods, the seller may resell them without giving the buyer notice of his intention so to do, or of the time and place of such sale, and recover the difference between the amount realized and the contract price, provided he exercises such right in good faith, and under such circumstances as are best calculated to protect the rights of the buyer and secure the best price.—MAGNES v. SIOUX CITY NURSERY & SEED CO., Colo., 59 Pac. Rep. 879.

116. TRUSTEES — Employment of Attorneys.—An attorney, at his own expense and risk, may employ an assistant to aid him in his professional work for a client, and charge such client with the reasonable value of the entire labor; and that does not militate against the rule that the relation of attorney and client does not imply authority to the former to employ another attorney at the client's expense.—VILAS v. BUNDY, Wis., 81 N. W. Rep. 812.

117. TRUSTS—Property — Conveyance.—Where a purchaser of land, before death, drew a draft on a third party in favor of his agent, to whom he sent it for collection, without instructions to apply the proceeds to the payment of land, and the agent procured its allowance as a claim against the purchaser's estate, and then assigned the claim to the purchaser's administrator, who canceled the allowance, the vendor's heirs were not entitled to have such cancellation vacated, though the purchaser intended the draft to be used in payment for the property, since no trust relation existed between the agent and the vendor.—SIXKILLER v. ROGERS, Ark., 55 S. W. Rep. 135.

118. USURY—Effect on Contract—Attorney's Fees.—A statute which forfeits the interest on a contract in case of usury, but does not make the contract void, does not affect a provision for attorney's fees in case of suit, and such provision is enforceable although the contract is held to be usurious.—UNION MORTGAGE, BANKING & TRUST CO. v. HAGOOD, U. S. C. C., D. (S. Car.), 98 Fed. Rep. 779.

119. VENDOR AND PURCHASER—Abandonment of Contract.—If a vendor fails to make a good general warranty deed, free from all incumbrances, at the fixed time agreed upon for the consummation of the sale, because of such incumbrances the vendees have the right to abandon their purchase and cancel their contract, and if the vendor refuses to place them *in statu quo*, they may apply to a court of equity for relief.—PARSONS v. SMITH, W. Va., 34 S. E. Rep. 922.

120. VENDOR AND PURCHASER—Contract.—Where a vendor was still in possession of the land, but had stipulated in a written contract of sale that he would cut no wood except for fire, plaintiff acquired no title to cross-ties cut by him on the land under an agreement with the vendor, since the vendor had no title to confer.—LESSER v. DAME, Miss., 26 South. Rep. 961.

121. WATER COURSE — What Constitutes — Surface Water.—A water course consists of bed, bank, and water. Yet the water need not continually flow, as many streams are sometimes dry. There is a difference between a water course and an occasional outburst of water which, at times of freshet, from rain or snow, descends from the hills and inundates the country. To be a water course, it must appear that the water usually flows in a certain direction, and by a regular channel with banks or sides. For obstructing or diverting a water course, and thereby damaging another, the party is liable.—NEAL v. OHIO RIVER CO., W. Va., 34 S. E. Rep. 914.

122. WITNESS—Impeachment.—Where defendant has elicited on cross-examination of a State witness that he had been convicted of burglary, the State, on re-examination, has the right to elicit from him that a new trial had been granted, and a *nolle prosequi* had been entered.—STATE v. DUPLECHAIN, La., 26 South. Rep. 1000.

123. WITNESSES—Transactions with Decedent.—In an action to recover for medical services to defendant's intestate, evidence of the plaintiff that he attended decedent, and operated on his wife, and that such services are worth the amount claimed, are incompetent, since they involve a transaction with a decedent, within Const. Schedule, § 2, prohibiting a party from testifying to "transactions" with a decedent in an action by or against his administrator.—CASH v. KIRKHAM, Ark., 55 S. W. Rep. 18.

124. WRONGFUL ATTACHMENT—Damages.—One against whom no attachment was sought, and whose name appeared in the copies of the attachment by mistake, cannot maintain an action for the wrongful suing out of the attachment; his cause of action being for the wrongful seizure of his property under the attachment by direction of the plaintiff therein.—FARMERS' & SHIPPERS' TOBACCO WAREHOUSE CO. v. GIBBONS, Ky., 55 S. W. Rep. 2.